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CONSTITUTIONAL HISTORY
OF THE
HOUSE OF LORDS

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A
CONSTITUTIONAL HISTORY
OF THE
HOUSE OF LORDS

FROM ORIGINAL SOURCES

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PREFACE

THOUGH there are many Constitutional Histories of England and Histories of Parliament, there has, it is believed, hitherto been no Constitutional History of the House of Lords. The reader in search of information could only extract it laboriously from disconnected passages in works of great length, or find it shaped as ammunition for the purposes of party warfare in political treatises. The scope of the present work is different from that held in view by such well-known historians as Hallam, May, Gneist, or Bishop Stubbs, or in the polemical essays of Prynne or Freeman. The materials used, though, to some extent, necessarily the same as those upon which they relied, have been largely drawn from other sources, and have been wrought to other ends. Statements of fact are consequently often inconsistent with those made in preceding works on the Constitution, but the original authorities on which they rest have been indicated. It has, therefore, been thought needless to point out the variations, except in some very remarkable instances.

One example may, perhaps, suffice to show that the reasons for differing from previous authors of

repute could not always be set forth with a due regard for space, and may at the same time serve to illustrate the principles of original research on which the book has been written.

It was stated by Blackstone, nearly a century and a half ago, that the whole Act for the Uniformity of Common Prayer was passed 'with the dissent of *all the Bishops*' and that the words 'Lords Spiritual' were, for that reason omitted throughout. The statement has been repeated again and again in successive editions of his Commentaries, and in the latest editions of Commentaries founded upon his. Hallam also has asserted in his *Constitutional History* that 'all the Bishops' protested against the Bill.

Blackstone and his followers give as their authority Gibson's *Codex Juris Ecclesiastici*. Gibson, however, says not that the whole Act, but only that a portion of it, was passed by the 'Lords and Commons' without any use of the word 'Spiritual,' 'because all the Bishops *present* dissented,' and he cites D'Ewes's *Journals* in support of his proposition. In the edition of the Statutes entitled the 'Statutes of the Realm,' it is again said that a portion of the Act was passed without the assent of the Lords Spiritual, and again upon the authority of D'Ewes's *Journals*.

Upon reference to the passage cited it is found that D'Ewes does not speak either of all the Bishops, or even of all the Bishops who were present, as dissenting either from the whole or from any portion of the Bill, but mentions only the Archbishop of York and eight Bishops.

Hallam's authorities are the *Parliamentary History* and Strype's *Annals*. *The Parliamentary*

History affords no warrant for the assertion ; Strype's *Annals* show only the names of the dissenting Archbishop and eight dissenting Bishops, though they are in one passage described as 'all the Prelates.'

D'Ewes, who professes to have obtained his information from the original Journals of the House of Lords, alleges that the Bill was read a third time on the 28th of April, 1559. When, however, the printed Journals of the House of Lords are consulted it is seen that there is no record of any sitting between April 22 and May 1. So far, therefore, as printed documents are concerned, there is absolutely no authority for a very important statement which has passed unquestioned during some five generations. The statement is, however, not improbable in itself, and the question naturally arose whether it could be established by any Journals of the House of Lords which have, for any reason, not been printed.

Mr. E. Fairfax Taylor, of the Judicial Office of the House of Lords, whose very able Calendar of documents of the House is in course of publication, for the Historical MSS. Commission, has most kindly instituted a search, and I cannot too warmly express my thanks for the courtesy he has shown and the pains he has taken. He has succeeded in tracing the MS. Journal for the year 1559, which has served as the basis of the printed Journal. As in the latter, so in the former, the days between April 22 and May 1 are missing. The pages, however, are in due order of succession, and there is no reason to suppose that the MS. ever contained anything which has not been printed.

It is not known that the original Journals of the

period are in existence elsewhere. In the library of the Inner Temple there are some copies of so-called Journals of the House of Lords which I have inspected, and in which the missing days are included. They do not, however, give the names of the Lords who were present. They show that the Bill was read a third time on April 28, and that the nine prelates dissented, but nothing more. They are evidently taken from the document with which D'Ewes and Strype were acquainted, which must have been merely a short note or abstract, and not a true Journal of the House in the ordinary sense of the term. D'Ewes, indeed, complains, in one passage, of the carelessness shown by the Clerk of the Parliaments, and it seems more than probable that no complete Journal was ever drawn up. In that case it would be impossible to prove the assertions made by Blackstone, Gibson, and Hallam, which have, in any case, been made on insufficient authority.

The omission of the words 'Spiritual Lords' from any particular Act, or portion of an Act, in the reign of Elizabeth, affords no safe ground for an argument that they all dissented. It was at that time a common practice to omit all mention not only of the Lords Spiritual, but also of all the Estates of the Realm from individual Acts or Chapters of a Statute, a not unusual form being 'by the authority of this present Parliament.' There was, however, a general heading to the Roll of Parliament, upon which all the Acts of a Session were enrolled; and the heading to the roll of 1559 is to the effect that the Act for the Uniformity of Common Prayer was passed,

like the rest, 'with the common assent of all the Lords, as well Spiritual, as Temporal, and of the Commons.'

Having arrived at these curious and somewhat contradictory facts, I had to decide whether the mode in which the Act was passed should be mentioned in support of a portion of the text (p. 327), in which the relation of the Spiritual Lords to legislative power is considered. I came to the conclusion that (except the general heading of the Parliament Roll) there was not sufficient evidence on which to base any definite statement. The heading, however, might be a mere form implying no more than the consent of a majority of the House of Lords. The number of the Bishops present, and their action, could be authoritatively ascertained only from the original Journal of the House; and the condition in which the Journal is found is of itself sufficient to suggest the necessity of the utmost caution.

I hope, therefore, I may venture to ask those who find some familiar statement omitted, or meet with a statement which they did not expect, to believe that the cause is not in every case inadvertence.

The publication of this book at a time when there is some political agitation in reference to the House of Lords is an accident. The work has been written without any political intention, and, to the best of my belief, without any political bias. I trace back the first idea of it to a question which a learned friend asked me, long ago, as to the mode of trying John Fisher, sometime Bishop of Rochester. In the course of the twelve years during which I have been Editor of the *Year Books*, many points relating to the peerage have forced

themselves upon my attention. I have found Bishops and Abbots commonly described as Peers of the Realm, and, for that and other reasons I have had to consider the status of Peers in general, their original position in the constitution, and the changes which it has undergone.

In excluding politics I have been compelled to exclude many matters of controversy. It could, I think, serve no good purpose to mention all the Bills which have been accepted in the House of Commons and rejected by the House of Lords, or which have been first brought into the House of Lords and have been sent thence to the House of Commons. I could not presume to say that either House had acted rightly or wrongly. In each case one party might hold one opinion, another party another opinion. To set down a bare catalogue of measures would be both wearisome and useless. I have even refrained from giving an account of the one Act which has acquired the special title of 'The Lords' Act'—that which was passed in 1758, for the relief of imprisoned debtors, and which, as its name imports, had its origin in the House of Lords. I have departed from the general rule only in cases in which the constitution of the House of Lords itself was affected, or appeared to be threatened with change.

For similar reasons I have noticed the increase of the peerage since the accession of George III in general terms only, and without reference to the real or supposed motives of particular Ministers, in which, perhaps, one party might see the highest political virtue, another the lowest political depravity.

The orthography of early names is of no great importance in relation to the subject of the book. I need only say that I prefer Rollo to Rolf, Canute to Cnut, Ethelred to Æthelred, for two very simple reasons. I know that classical English writers have written the words as I have written them, and I do not know that there was any settled and invariable spelling when Rollo, Canute, and the Ethelreds lived. It is possible that 'Ælfred' may be good *Englisc*, but I think it can hardly be denied that 'Alfred' is good English.

Since the manuscript of the work left my hands, many events have happened which it has been impossible to notice in the text. A new 'Peers Disabilities Removal Bill' has been introduced into the House of Commons, but has not proceeded further. Important questions have arisen out of the death of Lord Coleridge, and the subsequent acceptance of the office of Steward of the Chiltern Hundreds by his eldest son and heir; but the evidence laid before the Committee of the House of Commons on the mode of vacating seats has not yet been officially published. There have been some remarkable discussions in the House of Lords on a Finance Bill; and a Report of the Judicial Committee of the Privy Council made in 1886, in relation to the Legislative Assembly of Queensland and Money Bills, has been brought into singular prominence during the arguments.

Some of these matters belong, perhaps, quite as much to the domain of modern politics as to history. None of them appear, thus far, to call for any modification of the following pages. That which has occurred in the past cannot be undone by the

re-assertion of old or the development of new opinions or principles in the future:

τὸ γὰρ
φανθὲν τίς ἂν δύναιτ' ἀγένητον ποιεῖν;

I can only hope that the imperfections which may be noticed in my story, as I have told it down to the beginning of the present year, may be excused. The number of widely different subjects which it has been necessary to investigate must have given many opportunities for those errors which it is the innate human tendency to commit; but if revision after revision of the text, and verification after verification of the references are of any avail, the statements of fact should, at any rate, be in the main, correct.

AUGUST 27, 1894.

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CONSTITUTIONAL HISTORY

OF

THE HOUSE OF LORDS

CHAPTER I.

THE PRE-NORMAN PERIOD.

IN tracing the history of the House of Lords, as consisting of two estates of the Realm—of the Lords Spiritual and the Lords Temporal—it is unnecessary to consider in very minute detail the events which preceded the Norman Conquest. There are, however, without doubt, some broad and well-marked features of earlier periods which can be recognized as persisting through the modifications caused by the lapse of time and the mutability of human affairs, and which, therefore, cannot be dismissed as absolutely irrelevant. CHAP. I.

The titles of honour of the Temporal Lords are derived, in the first instance, from titles associated with some kind of service to the State or to the Sovereign—military service, or administrative service, or judicial service, or some combination of the three. This statement applies equally to Duke, Marquess, Count (or Earl), Viscount, and Baron. The origin of temporal titles of honour.

Comes, *Comte*, or Count may, perhaps, be regarded as the earliest of these titles. Even during the Roman occupation there were in Britain two *Comites*—one the Roman Counts and Dukes in the

CHAP. I. *Comes Saxonici Littoris per Britanniam*, the other the *Comes Britanniarum*. The former, the Count of the Saxon Shore, had a military jurisdiction, which extended from Brancaster, in Norfolk, past Caistor and Yarmouth, round the Isle of Thanet (with garrisons at Reculver and Richborough) to Dover, and thence to Shoreham, with probably intermediate stations at Lymne, Hastings, and Pevensey. His power may possibly have extended further westward, but, as four out of his nine fortresses were almost certainly in Kent, it is clear that his chief strength was concentrated there. His nine castles are delineated in his ensign in the *Notitia Utriusque Imperii*¹. The *Comes Britanniae*, or *Britanniarum*, had a much wider, if not a supreme military jurisdiction in Britain. His ensign was one large fortress on an island somewhat in the shape of Great Britain; and it is distinctly stated that he had under his disposition the *Provincia Britanniae*².

The signi-
fication of
Comes or
Count.

At different periods of Roman history the word *Comes* had different significations, but the only three which it is necessary to bear in mind are that of an officer having military authority, that of an officer having administrative jurisdiction, and that of the companion of the Sovereign. At the time of the compilation of the *Notitia* there appear to have been six *Comites rei militaris*³ in the Western Empire, of whom two were the Counts in Britain already mentioned. There were many more in the Eastern Empire; and both in the Code of Theodosius and in the Code of Justinian there are divisions relating to these Counts for military affairs, and to the Counts who govern provinces⁴.

The juris-
diction of
the *Dux* or
Duke.

The title which seems to be next, if not equal in antiquity, is that of Duke, which is also of Roman origin. There was during the Roman occupation of Britain a *Dux*

¹ *Notitia Occidentis*, cap. xxv, ed. Böcking, vol. ii. p. 80*, and Notes, p. 580* et seq.

² *Ib.*, cap. xxvi, ed. Böcking, ii. 82*.

³ *Ib.*, cap. i, ed. Böcking, ii. 4*.

⁴ *Comites qui provincias regunt*, Cod. Theod. lib. vi. tit. 14 and 17; Cod. Justin. lib. xii. tit. 12 and 14.

Britanniarum. His ensign, like that of the Count of the Saxon Shore, was an island with castles upon it, but he had fourteen, while the Count had only nine. He had fourteen prefects under his command, in addition to those holding fortified posts along the line of the wall of Severus¹. He was, like the Counts, a military officer, and his chief duty was apparently to guard the northern frontier. He was the only Duke in Britain; but there were eleven others in other parts of the Western Empire².

CHAP. I.

Little or nothing is known from contemporary evidence of the events which happened in Britain for some generations after the Romans finally abandoned the island. In that part of it which was subsequently called England the Roman language seems to have been effaced by Teutonic forms of speech as effectually as the language of Gaul had in an earlier age been supplanted by the Roman language itself. The Christian religion, which must also have penetrated into Britain during the Roman occupation, was, so far as is known, destroyed in the same district by the invading Angles, Saxons, Frisians, and Jutes, who conquered the land. The fate of the previous inhabitants must always remain uncertain. It has been the theme of endless conjectures, of which probably the best are those founded on the analogy of other countries, where Teutonic tribes came into contact with Roman civilization.

Gap in the
history of
Britain
after the
departure
of the
Romans.

Roman Britain, however, differed in one very important point from those continental provinces of the Roman Empire which were overrun by Teutonic invaders. Being farther from Rome it was farther from the influence of the Roman Church. The Christian religion in Britain appears at a very early date to have differed in some points from the Roman doctrines, and, having less support, fell an easier prey to the invaders. The course of history was consequently somewhat different. The language and the religion naturally perished together from similar causes.

Differences
between
the condi-
tion of
Britain and
that of
Roman
provinces
on the
Continent

¹ *Notitia Occidentis*, cap. xxxviii, ed. Böcking, ii. 112*.

² *Ib.*, cap. i.

CHAP. I.

Augustine's
mission :
Bishops
and
Abbots.

An interval of more than a century and a half passed between the departure of the Roman legions and the arrival of the Roman missionaries under Augustine, by whose means the inhabitants of the country which had been Roman Britain again became Christians. This was a very important epoch, not only in church history, but also in constitutional history, because bishops and abbots were to play a very important part in the moots, councils, and parliaments of a future age. Bishop and Abbot, like Count and Duke, were Roman words, but Roman only by adoption from other tongues. Bishop, the Latin *Episcopus*, came from the Greek *Ἐπίσκοπος*, an overseer. The word has gone through many changes in many languages, but both the English Bishop, and the French *Évêque*, though they have not a single letter in common, can be traced historically to the common ancestor, the *Episcopus*. Abbot is said to be derived originally from the Syriac and Chaldee *Abba*, a father, but the word became thoroughly Romanized in the form *Abbas*, from which it has grown into modern European languages.

No firmly
established
kingdom of
England
before the
Conquest.

When Christianity was at length firmly established in England, the Bishops and Abbots, but at first more particularly the Bishops, began to be leading men in the State. The sees, however, differed from those of later times. It is, indeed of importance to remember that before the conquest of England by William the Conqueror there had not practically been any firmly established kingdom of England. The petty principalities into which we find it divided when it first appears in history had never lost their distinctive names, and had never been firmly united under one dynasty. The first king of England was Athelstane, rather than Egbert; and he died only a hundred and twenty-six years before the battle of Hastings. His English successors had but an unquiet time for half a century, when the invasions of the Danes ended in the recognition of Canute as king in 1016; and England remained under the sway of the Danes until the time of Edward the Confessor, who, if of English blood, was hardly English in his sympathies.

The early bishoprics represented the successive conver-

sions of the petty chieftains who held sway in different parts of England, and of their subjects. Canterbury and Rochester represented the conversion of Kent; London the conversion of the East Saxons and Middle Saxons; York the conversion of Northumbria; Dorchester in Oxfordshire the conversion of Wessex; Lichfield (at one time made an Archbishopric) the conversion of Mercia; Dunwich (afterwards Elmham, and Thetford, and still later Norwich), the conversion of East Anglia; and Selsey (afterwards Chichester) the conversion of Sussex.

CHAP. I.

The sees of the early Bishops represented the petty kingdoms or principalities into which England was divided.

New sees were subsequently created, and some redistributions of dioceses were effected, but originally each little king of the Heptarchy, or Octarchy, had a Bishop, who was the head of the Church in his little kingdom, and who was his adviser in all religious affairs. From a superior knowledge of letters the bishop also acquired an influence which extended beyond his spiritual authority; and, though somewhat changed in relative value, the authority and the influence remained when England was nominally united under one government.

Where once there had been petty kings or princes, there were in later generations Earls, owing some sort of allegiance to the King of England. Where there had been one Bishop or Archbishop, there were bishops in greater number. Still, there always remained a practice that the Bishop should be the associate of the Earl, though his relative importance diminished, as the Earls continued to be few and the Bishops became many. At the Shire Moot, or County Court, the Earl was supposed to be present with the Bishop; but a single Earl must have sat in many Shire Moots, while the Bishop had a seat in one only, or, at any rate, in fewer than the Earl.

Earls took the place of petty princes or kings; the Earl and the Bishop in the County Court.

These lay and ecclesiastical magnates not only sat to administer such law as was known in those times, in their respective districts, but were summoned as *Witan* or wise men to advise the King of England. Abbots also, or some of them, at times formed part of the King's Council, as well as other persons, of whom a greater or less number

Earls, Bishops, and Abbots among the *Witan*.

CHAP. I. appear to have attended, or to have been summoned to attend, according to circumstances or to the particular object in view at the particular moment.

The titles
of Lord
and Earl :
Lords and
lordless
men.

The origin of the two titles of Lord (*Hlaford*) and Earl (*Eorl*) is lost in the obscurities of an unlettered age, and the two words have become the playthings of rival philologists. Of the Saxon or 'Englisc' lords little is known with certainty except that which may be learned from the Saxon laws. Every man was supposed to have a lord¹ : and a lordless man was in evil plight². Lords, too, might have over-lords, and the over-lord of all was the king. From one point of view the lord stood in a personal relation of superiority to those who were his men or vassals. From another point of view he was a land-holder who exacted services from his undertenants or his slaves. But there is nothing to show that every person who might be called lord was entitled or summoned to sit among the Witan; and it seems to be as a term of respect that the expression endured after the Conquest rather than as a term implying any right to legislate or to be the King's Counsellor.

Ealdorman
or Alder-
man and
Earl.

Earls, however, were in a different position, and it may be necessary to say a few words as to their early functions and status. Before the time of Canute the various divisions or shires appear to have been under the lay jurisdiction of an officer called *Ealdorman* or Alderman, whose authority was both military and civil. He appears to have been responsible for the military array of his particular shire, and to have sat with the Bishop in the Shire Moot for various legal and administrative purposes. His title is almost the exact equivalent in signification of the French *Seigneur*, each implying, in the first instance, seniority, and then, derivatively, respect and authority. While, however, the

¹ *Ancient Laws and Institutes of England*. There are abundant illustrations from the time of Wihtrred (about 700 A. D.) downwards.

² He might be slain as a thief. Laws of King Athelstane I. *Ancient Laws and Institutes*, p. 85.

French *Seigneur* became a term implying chiefly lordship over land, the Alderman, though no doubt usually a land-owner, was, as Alderman, only an officer having certain duties and responsibilities. As land-owner the English equivalent of the French *Seigneur* was Lord. CHAP. I.

The Alderman's title does not appear to have been strictly hereditary, though it may often have remained in the same family. The lands which an Alderman held he might have held by inheritance, but he was not necessarily land-owner over the whole of his shire, and consequently his honours did not necessarily descend with his lands. When he attested a charter in the Latin language he often called himself Duke, or rather *Dux*, the word being used perhaps as the equivalent of *Heretoga*, or military leader¹, more probably in imitation of Roman fashions. He was not, however, a Duke in the modern sense, possessing hereditary dignity without official responsibility. It was essential that he should be capable of service in the field, and if at his death he left only an infant son, that son would be wholly incapable of performing his duties either in the field or in the Shire Moot. Alderman
and *Dux* or
Duke.

The territorial jurisdiction of the Alderman extended sometimes over a large district, sometimes over a comparatively small district. It is not known with certainty when the country was first divided into 'shires'; it is hardly certain that any Alderman ever presided over a shire of exactly the same extent as one of those which are seen to be in existence in Domesday Book. He seems more frequently to have had the command over a territory representing one of the earlier kingdoms, as, for instance, Northumbria, Mercia, or East Anglia. The point is, however, of but little importance, because the title practically disappeared with the Danish supremacy under Canute. From that time forward the officer who exercised a similar jurisdiction was called *Eorl*, the modern Earl. Territorial
jurisdiction
of Alder-
man or
Earl.

¹ See, for instance, Kemble's *Codex Diplomaticus*, charter No. 219, and see *The Saxons in England*, ii. 129, note.

CHAP. I. His authority also was not usually restricted to a single shire, as the shires are set forth in Domesday Book. In some parts of the country it seems to have been of variable extent, in others more nearly uniform from one generation to another. Sometimes one Earldom appears to have been more or less subordinate to another, and at other times to have been in no such subordination. Sometimes the Earldom passes from father to son, as if hereditary; sometimes, though not from father to son, yet from one member of a house to another member of the same house.

Earldoms
before the
Conquest
not strictly
hereditary.

There has been some evidence produced to the effect that, before the Norman Conquest, the Aldermanship or Earldom of Chester passed from father to son for seven successive generations¹; but if so, the case was quite exceptional. The Earldom of Northumbria affords perhaps another illustration of the office or dignity being frequently in the hands of members of the same family. It does not, however, show an absolutely continuous hereditary descent, and it did not always pass as an undivided Earldom².

Absence of
settled
principles
in England
before the
Conquest.

An Earldom, being a military, judicial, and administrative office, was necessarily subject to the inevitable rule that it must be in the hands of some person capable of executing it. The throne itself was not strictly hereditary, much less the official rank of an Earl. Moreover, the country had, since the departure of the Romans, never been in a condition sufficiently settled or even sufficiently civilized to render men familiar with the idea of definite principles

¹ The pedigree which is not, perhaps, to be taken otherwise than *cum grano salis* is appended to a MS. of Florence of Worcester cited by Dugdale, *Mon. Angl.* iii. 192, as belonging to the Archbishop of Armagh. I am indebted for the reference to Sir Francis Palgrave's *Rise and Progress of the English Commonwealth*, Part 2 (Proofs and Illustrations), p. ccxi.

² The genealogist may be interested by the comparison of the pedigree given by Florence of Worcester (*English Hist. Soc.*), ii. 251-2, with that given by Simeon of Durham (*Rolls Series*), ii. 197-9 and 382-4. Not only does one differ from the other, but neither agrees with the statement in the *A. S. Chronicle*, *anno* 1016, as to Eric the Dane having then become Earl.

remaining fixed from generation to generation. After the Conquest there was some clamour for 'the laws of Edward the Confessor,' but not for laws rendered venerable by a higher antiquity. The six centuries which had elapsed since the last of the Roman legions left the island, had not sufficed for a reconstruction of the warring elements within it, or even greatly changed the external conditions. The country had never been free from intestine strife, and never secure against the attacks of invaders from the Cimbric Chersonese and its neighbourhood. A strong hand, a stern discipline, and a genius for organization were required to convert England into a homogeneous whole. They came not from within, but from without. Harold's deficient and comparatively ill-trained levies were as little able to resist the French chivalry, under William of Normandy, as any king reigning, or seeming to reign, in England, had been able to mould his subjects into a well-governed nation.

CHAP. I.

CHAPTER II.

THE IDEAS OF NOBILITY AND SUCCESSION BROUGHT BY THE CONQUEROR FROM FRANCE, AND THEIR SOURCES.

CHAP. II.

Necessity
of con-
sidering
the ideas
brought
from
France.

AS it was necessary to give some slight account of the position of the Bishops, the Abbots, the Earls, and the Lords whom William the Conqueror found when he made himself master of England, so also it is necessary to give some account of the organization and the ideas of nobility which he brought with him from Normandy. This can hardly be rendered intelligible without casting a retrospective glance at a far more remote period, and bringing to mind once again the Counts and Dukes (the *Comites* and *Duces*) of the Roman Empire.

Roman
Comites
and French
Counts;
the Counts
and the
Missi.

After the successful invasion of Gaul by Clovis in the year 486, and the establishment of his kingdom, the conquered territory was divided into districts which were placed under the government of Counts. Thus the old Roman term was preserved and applied to the divisions of the Frankish kingdom. It was for many centuries afterwards associated with a territorial jurisdiction in France, though the country passed through innumerable vicissitudes. The jurisdiction was not only military but civil, and in the time of Charlemagne there was an organization which very much resembles in principle, though not in the intervals of time, that of the County Court in relation to the Eyre in England in the thirteenth and fourteenth centuries. Charlemagne's

Missi, or Justices specially delegated, were four times a year to hold pleas with the several Counts in some convenient place, while each Count was in the intervening time to hold his own pleas and was himself to do justice¹. CHAP. II.

The title of Duke also became early associated in France with territorial jurisdiction, and there seems, indeed, to have been in some cases but little distinction between a Duke and a Count, though in others the area of the Count's authority was far more limited. The French *Duc* derived his designation etymologically from the Roman *Dux*, and there is every reason to believe historically also, though he at length impressed upon it a more permanent character than that of the Roman *Dux* in a Roman Province. Roman
Duces and
French
Ducs.

It has, indeed, been suggested that the titles of Count and Duke are historically of Teutonic, and not of Roman origin, though no one has yet been bold enough to deny that the words can be clearly traced downwards from the times of the Roman Empire. The tribes which overran Romanized Gaul, as well as the tribes which overran Romanized Britain, had, in their own dialects, a word which was nearly the equivalent of the Roman *Dux* in its original sense of the leader of an army. This took various forms, *Heretog*, *Hertog*, *Heertog*, *Heretoga*, *Heretocha*, or, in High German, *Herzog*. It does not appear, however, that before any contact of Teutonic peoples with the Romans, the term implied any territorial jurisdiction. Every fighting tribe or nation must, of course, have had a leader of its forces, but only a great and long established Empire like that of Rome could, in the first instance, have given the leaders of its forces a clearly defined territorial jurisdiction passed on from one leader to his successor. A Duke of the Frankish Empire or Kingdom had more in common with a Roman *Dux*, such as the *Dux Mauritaniae Caesariensis*, the *Dux Pannoniae Secundae*, the *Dux Belgicae* The
German
Comites of
Tacitus ;
the
German
Heretogs,
or leaders
of armies.

¹ *Caroli Magni Capitularia*, ed. Pertz, *Capitulare Aquisgranense* (A. D. 812), § 8 (vol. i. p. 174).

CHAP. II. *Secundae*, the *Dux Germaniae Primae*, or the *Dux Britanniarum*¹ whose head-quarters were at York, than with a general of forces destined for the invasion of the lands of a neighbouring tribe or of the Roman Empire itself.

There are some often quoted passages in the *Germania* of Tacitus from which it has been argued that the continental title of Count is of purely Teutonic origin. The words of Tacitus, if they could be rightly interpreted to support this remarkable proposition, could with equal propriety be adduced to prove that the worship of Mercury was learned from the Germans (who offered human sacrifices to that god) as well as the worship of Hercules and Mars, to whom the Germans sacrificed animals². According to this author, who nowhere states the sources of his information, the German tribes or nations had kings who were chosen by reason of noble birth, and *Duces* or leaders who were chosen for their valour. These kings had not absolute power; and the leaders were popular in proportion to the distinction of their services in the field³. There were councils of two kinds, those in which the *principes* or chiefs took part, and those in which the whole tribe was present. In the former, matters of smaller moment were settled; matters of greater importance were decided in the latter, though discussed in the former. The chiefs or *principes* were elected in council and their function was to administer justice in different districts. 'A hundred *Comites*, from among the people, attend upon each, at once constituting his council and lending him authority.' A very young man of princely rank might, without degradation, be one of the *Comites* of another chief⁴, and there were various degrees of *Comites* regulated according to the pleasure of the chief whom they followed.

¹ *Notitia Utriusque Imperii*, cap. v, ed. Böcking, vol. ii. p. 23*.

² Tac. *Germ.*, cap. 9. Caesar's description is entirely at variance with that of Tacitus. According to him the Germans had no gods but the Sun, the Moon, and Vulcan or Fire, and had never heard of any others. Caesar, *Comm. de Bell. Gall.* vi. 21.

³ Tac. *Germ.*, cap. 7.

⁴ *Ib.*, caps. 11-13.

On these passages which are in themselves very obscure, CHAP. II.
has been built the theory that the mediaeval Counts are the representatives of the *Comites* or 'Companions' who attended the German *Principes*. There is however, not the slightest evidence to show that any one of these companions ever had any territorial jurisdiction whatever. It was the *Princeps*, whatever he may have been, who had jurisdiction. His *Comites* or companions were young men, or men of martial prowess, and not sage elders. In epigrammatic language Tacitus says 'the *Principes* fight for victory, the *Comites* for the *Principes*¹.'

Attempts have been made to show a connexion between the High German *Graf* (the modern High German equivalent of the French *Comte*) and the English or rather 'Englisc' *Gerefa* (*Reeve*), and to make both equivalents of the dignity to which Tacitus gives the name *Comes*. It is not by any means certain that there is any affinity between *Gerefa* and *Graf*, and it appears highly improbable that the word *Graf*, which is always associated with the name of a place, can in any way be traced back to the *Comes* or companion of a German *Princeps*. The most remarkable effort in this direction was made by the distinguished philologist Grimm², who derived *Gerefa* from *Rôf* a roof, suggesting apparently that *Gerefa* and *Graf* meant a companion in the sense of a person who shared the same roof, just as *Gefährte* means a person who travels with another, or is his travelling companion. The derivation, it is true, was put forward only interrogatively; but in all its vagaries philology probably never wandered further astray than in this conjecture. The last thing of which, according to Tacitus, one of the ancient German *Comites*, as the Roman called them, would have thought, was a roof. Not only were his dominant ideas those of glory in the field, but he and his fellow-countrymen had no knowledge of the use of mortar or tiles³.

Gerefa and *Graf*;
Grimm's
etymology
untenable.

¹ Tac. *Germ.*, cap. 14.

² *Deutsche Grammatik*, ii. 737, 'Rôf (Tectum) daher Gerêfa (Socius, Comes)?'

³ Tac. *Germ.*, cap. 16.

CHAP. II.

No German literature previous to German contact with the Roman Empire.

Similarity of laws wherever Teutons settled in the Roman Empire.

Identity of early titles and terms of respect in France, Italy, and Spain : all of Roman origin.

The slender, vague, and contradictory notices in the works of Caesar and Tacitus cannot be supplemented by any German writings of the same period, or of any period within some hundreds of years afterwards. There is no German literature of any kind whatever of earlier date than the translation of portions of the Bible into Gothic by Ulfilas near the end of the fourth century ; and this, of course, throws not the least light upon German manners and customs. It tells us, indeed, that German literature began when Germany had felt the influence of the Roman Empire, and through the Roman Empire, of Christianity.

The first real glimpse which can be obtained of Teutonic laws presents itself to us after the Teutonic tribes had settled in portions of the Roman Empire, and then, so far as the continent is concerned, they have, for the most part, arrayed themselves in the Latin language. As might have been expected *a priori*, these laws of kindred tribes, settled in different portions of the same empire, have much in common, though differing in many of their details. There is a family likeness between the laws of the Visigoths in Spain, those of the Lombards in Italy, and those of the Burgundians, and those of the Franks, whether Ripuarian or Salic, in Gaul.

While, however, there is only similarity in laws there is absolute identity in titles and terms of respect, and they are, without exception, of Roman origin. As in France, so in Spain and Italy, the two Roman titles of *Dux* and *Comes* were perpetuated, with an uninterrupted succession, from the time of the Roman Empire into times when the imperial ideas of government and of society had given place to ideas wholly different and even utterly opposed. The *Duque* and the *Conde* in Spain survived the Vandals, the Visigoths, and the Moors. The *Duca*, the *Doge*, and the *Conte*—titles which had had their origin in Italy itself—were preserved in Italy through successive generations. They were different, it is true, from the Roman *Duces* and *Comites*, but different only as a descendant differs from an ancestor.

Concurrently with the titles of Count and Duke there must have continued in Gaul, Italy, and Spain another Roman term of great significance—that of *Senior*, used originally in the sense of an elder, afterwards in the sense of one entitled to respect—the French *Seigneur*, the Italian *Signor*, the Spanish *Señor*. Like many other words it probably existed in conversational Latin, or the Latin of the lower classes, and asserted itself when the Empire had fallen on evil days, when literature had decayed, and when the colloquial speech of the inferior population alone remained to perpetuate the imperial language. It probably descended from a very remote period when the Senate consisted of a Council of Elders, and when one of the qualifications for the rank of Senator was that of being a *Senior*¹.

CHAP. II.

The
French
Seigneur :
Seigneur and Lord
of Parlia-
ment.

Whatever the origin of the word, however, it is of importance in the sense which it acquired in France, of lord, or person having seignory in the legal sense of the term. It came to be used in Law French in England, sometimes in this sense, and sometimes also in the sense of a Lord of Parliament.

In Spain, Italy, and Gaul, the barbarian invaders very soon adopted, not only the language and the titles which they found existing in the conquered lands, but the religion also. They came as heathens, they remained as Christians. While however they adopted the titles and the faith which they found in the conquered lands, the form of government was necessarily modified by new conditions. The new

Adoption
of the
Roman
religion
by the
barbarian
invaders.

¹ It is curious to find in Livy the *Patres Conscripti* or Senators divided into *Seniores* and *Juniores*, the greater respect being for the *Seniores* :—‘*consulibus et senioribus patrum*,’ Liv. ii. 30; ‘*Consulares ac Seniores*,’ Livy iii. 41. It has been suggested that *Dominus*, lord, was replaced by the Latin *Senior* only as a translation of the German *Elder*.—Professor Max Müller’s *Lectures on the Science of Language*, i. 229. This theory is noted; but it would be a very remarkable coincidence if all the tribes which invaded France, Italy, and Spain, always used the word *elder*, as the only word expressing lordship, and if all the inhabitants of all those countries translated it by the same Latin word.

CHAP. II. comers did not rule, as Rome had ruled, by an organization having their ancient home for its centre. When Romans conquered a province they conquered it for Rome; when the barbarians conquered a province they conquered it for themselves, made it their habitation, and severed themselves from their mother country for ever.

Power
acquired
by the
Bishops
and
Abbots.

The outcome was everywhere very similar and very remarkable. The Church acquired an extraordinary power over the invaders, or, at any rate, the descendants of the invaders who had come in without any knowledge of the Christian religion. It is said that in their native wilds the Teutonic chieftains never had absolute power. They certainly had not when they settled in foreign lands and accepted a foreign faith. They had always, perhaps, been controlled by a council of some kind; they may possibly have taken advice of some of their pagan priests in their northern homes; but until they reached their new settlements their acts and their counsels were never influenced by a hierarchy which, in spite of occasional bursts of heresy, acknowledged the Roman Pontiff as its head. They imposed a yoke on those who had once been subjects of the Roman emperors, and themselves accepted the guidance of Bishops who represented a spiritual instead of a temporal Roman Empire.

The power of the Bishops, supplemented by that of the Abbots, varied in different kingdoms or dukedoms, and at different times, but the prelates everywhere succeeded in obtaining a place in the councils of the sovereign, and in the deliberative assemblies of the nation—in France no less than elsewhere. The barons or lay tenants-in-chief also had their place in these councils and assemblies, but it appears to have been usual to give the prelates precedence, as they are commonly mentioned first when any council or assembly is noticed.

Dukes and
Counts,
Bishops
and
Abbots,
through-

It thus appears that, wherever there was a Teutonic settlement in a portion of the Western Empire, the form of government and the social condition differed alike from those of imperial Rome and from those which, according

to Tacitus, existed in ancient Germany. In names or titles, however, the old Roman influence prevailed. Dukes and Counts, Bishops and Abbots were borne above the deluge of foreign invasion; and although Barons, and at a later period Marquesses were added to their ranks, a majority of Roman appellations has always been maintained on the continent.

CHAP. II.

out the
Teutonic
settlements
in the
Western
Empire.

Some four hundred years after the Western Empire had perished, Rollo the Northman fell upon a province of France, very much as the Franks and other tribes had fallen upon Roman Gaul. Then occurred a very curious repetition of history. The Normans who overran and settled in Neustria accepted the language, the religion, and even the political institutions of the French, just as the Franks and other tribes had a few centuries before accepted the language and the religion of the Romans. Normans became French Counts and afterwards Dukes, like other French Counts and Dukes with a territorial jurisdiction. It might indeed almost be said that they became more French than the French themselves, and gave increased vitality to the feudal system which they adopted.

Parallel
between
the oc-
cupation of
Neustria
by the
Northmen
and of
portions of
the Roman
Empire by
earlier
invaders.

Though less than two centuries elapsed between the descent of Rollo the Northman upon Neustria in 876, and the battle of Hastings in 1066, the interval sufficed not only to efface the differences between the inhabitants of Normandy and the inhabitants of the rest of France, but even to render the inhabitants of Normandy proud of the title of Frenchmen. They called themselves not Normans, but Frenchmen, and it was as Frenchmen that they distinguished themselves from the English whom they had overcome and in whose land they had settled. In most of our records¹, when occasion arises to draw a distinction

The
Normans
accept the
religion
and
language
of France.

¹ The *Dialogus de Scaccario*, lib. i. cap. 10, may perhaps be cited as an exception. The *Francigenae* are there called *Normanni*; but the *Dialogus*, though appearing in the Red Book and in the Black Book of the Exchequer, is not a record of legal proceedings. It is merely a treatise which has been bound up with other matter relating to the Exchequer. The term used in rolls and charters is *Francigenae*;

CHAP. II. between the two populations, the English are described as *Angli* or *Angligenae*, the invaders from Normandy and their descendants as *Franci* or *Francigenae*.

The hereditary principle in France : succession of the Counts and Dukes of Normandy. The ideas which William the Conqueror brought with him were, therefore, the ideas of Frenchmen. The feudal system had reached maturity in France, and William himself held his Duchy of Normandy as a fief of the French crown. The principle of hereditary succession appears to have been now accepted in relation to the kingdom of France itself, to the great French fiefs, of which the Duchy of Normandy was one, and to the lands held of the greater feudatories by subinfeudation. Hugh Capet had transmitted the crown of France to his son, to his grandson, and to his great grandson, Philip I ; and it was destined to be transmitted to his descendants for many generations afterwards. In the County, or, as it afterwards became, the Duchy of Normandy, the principle had been recognized without interruption from the time of Rollo. Rollo, on his abdication, was succeeded by his son William, and William, who left no legitimate issue, by his natural son (though a minor) Richard I. Richard II (though also a minor) succeeded his father Richard I, and was, in turn succeeded by his eldest son Richard III. On the death of Richard III, apparently without issue, he was succeeded by his brother Robert, who left no legitimate offspring. Robert's natural son, William II, however, was, like Richard I, recognized as the heir, though a minor only some nine years of age.

Contrast between the principles accepted in Normandy and those accepted in England. In Normandy, it will be observed, the succession from father to son was maintained in the most adverse circumstances, the omission of the marriage ceremony by the parents not being regarded as an objection to the child when the child was duly recognized by the father. William the Second of Normandy was William the Conqueror—William the First of England. According to our later law he would

the latter term is more correct in every way, as the Conqueror's followers were not all from Normandy.

have been styled 'no man's son' (*nullius filius*). He, CHAP. II. however, represented, in his own person, according to the manners and customs of the age, two principles which had been consistently followed since the time of his ancestor Rollo—the principle of hereditary succession, and the principle that the rights of a minor were not to be set aside.

The principles which were observed in the case of the Norman Counts and Dukes who held of the King of France, were without doubt observed in the case of the vassals who held of the Duke of Normandy. In both cases they may have had to undergo the strain of an ambitious and turbulent nobility always ready for war and always seeking self-aggrandizement. In France they bore the strain and survived; in England they never completely asserted themselves before the time of the Conquest. Of the two previous kings of England one (Edward the Confessor) was not the direct heir to the throne, and the other (Harold) had no title but that of election.

CHAPTER III.

EFFECTS OF THE CONQUEST FROM WILLIAM I TO HENRY I :
THE WITAN AND BARONAGE MAINLY FOREIGNERS.

CHAP. III.

The
Conqueror
assumes
the part
of rightful
sovereign,
recogniz-
ing the
privileges
of his
English
subjects.

THE Conqueror, though he had no sort of hereditary right to the throne, had, as was alleged, the expressed wish of Edward the Confessor that he should succeed, and had, after the battle of Hastings, the assent of the majority of the people. He took the coronation oath which appears to have been usually taken by English kings. He assumed at first the position of lawful successor to Edward, of a victorious and rightful sovereign who had delivered his country from the usurper Harold. Except those who had borne arms against him, he did not immediately dispossess the English landholders of their lands. Though he regarded Stigand, the English Archbishop of Canterbury, with disfavour, he did not immediately dispossess the English bishops of their bishoprics. He accepted his consecration at the hands of Aldred, the English Archbishop of York, sent his greeting to the Londoners in their own language, confirmed their privileges and those of other townsmen, and even extended the hand of friendship to Edgar the Atheling, who, if the principles of hereditary succession had been followed in England as they were in Normandy, would now have been King.

Delusive
character
of the as-

Partly for these reasons, and partly because there is a fashion in history, as in most mundane affairs, there has

of late years been a tendency to minimize the effects of the Conquest. The natives of England continued to speak of Earls after the Conquest as they had spoken of Earls before. They spoke of William meeting his *Witan* just as they had spoken of Edward the Confessor and of earlier kings. There were still Sheriffs in the shires, and Moots still assembled in them. *Sac* and *soc*, *tol* and *team*, *infangenetheof* and *utfangenetheof*, and many other words of sound as sweet to native ears were still applied to native customs not yet extinct. How then did the Conquest change the government of England?

CHAP. III.

sumption :
Lords
gradually
become
seigneurs,
and lord-
ship
seignory.

At first sight the answer to this question might seem to be that no change of great importance was effected. And if mere words were regarded, instead of the facts underlying them, the same answer might be given even after closer inspection. Any person, however, writing the *Englisc* language of the day could only express himself as that tongue permitted him. According to his education there was but one word to convey all that was signified by the Latin *Dux*, *Comes*, or *Princeps*, by the French *Duc* or *Comte*, and that word was *Eorl*. According to his ideas the persons who constituted the council of a sovereign or quasi-sovereign were *Witan*, and any assembly of such persons was a *Witenagemot*. William himself, regarded as Duke of Normandy, or rather of the Normans, was *Eorl*¹, and whenever he held a council it was necessarily a *Witenagemot* or Council of *Witan*. When a French follower of the Conqueror became possessed of an English lordship he became possessed of all its incidents. It was nothing to him that the natives called them by the accustomed names, for which he had the most profound contempt. He took his privileges and his profits, his *sac* and his *soc*, his *tol* and his *team*, his *infangenetheof*, and his *utfangenetheof*. The greater the privilege and the greater the profit, by whatsoever names they might be called, the better he was pleased.

¹ A. S. Chron. A.D. 1052. See also A.D. 1031, 'Robert Eorl of Normandi,' and A.D. 1087, where William's eldest son Robert is 'Eorl on Normandi.' A foreign Count is always 'Eorl' in the Chronicle.

CHAP. III. The natives, whose master he had become, may have called him lord, as they had previously called the native lord who had been ousted. He did not so style himself. He was their *Seigneur*, his right was seignory, and as seignory it was known ever afterwards in the laws of the country.

If William was elected King in a Witenagemot, it was not a Witenagemot of Englishmen alone.

The *Witan* assembled after the Conquest¹, but they were never again the *Witan* which had assembled before. The *Englisc* words *Witan* and *Witenagemot* conceal a revolution under identity of expression. From the very moment of William's coronation there was a change which became greater and greater during his reign and those immediately succeeding. His title, if not that of the sword, or of the bequest of Edward the Confessor, was elective; but his election was not in an English *Witenagemot*. The French invaders were present as well as the English *Witan*, and though the Archbishop of York asked the English whether they would have William for their king, the Bishop of Coutances put the same question to the French². His election was an election by both, but, so far as the English were concerned, practically under compulsion. The Council of the Conqueror was never wholly English, and in the time of his son Henry I the process of denationalization was almost complete.

Gradual substitution of foreign for native dignitaries both lay and ecclesiastical.

Nothing, perhaps, reveals more clearly than contemporary charters the policy of the Conqueror and the yoke under which the English were being passed. They show by their attestations the persons by whom he was surrounded, and who constituted his Council. He would have been more than human had he not more trusted those who had supported him in his enterprise, and to whom he owed his success, than those whom he had vanquished, and who would have expelled him as an usurper had they only had the power. Before he had been fifteen years upon the throne he had abandoned all pretence of recognizing native laymen as his councillors, and he had made great progress

¹ A. S. Chron. A. D. 1085, and even A. D. 1100.

² Gul. Pict., *Gesta Guillelmi Ducis*, pp. 205-6.

in placing the highest dignities of the English Church in the hands of foreigners. Lanfranc, the Archbishop of Canterbury, was an Italian from Milan; Thomas, the Archbishop of York, was a Frenchman from Normandy, and other English sees had also foreign occupants. The Abbeyes and Priories alone appear for some time to have retained native English Heads.

By a reflected light, as it were, the word 'Parliament' may be carried back to the reign of the Conqueror—to the year 1081, though it does not seem to have come into use for some time afterwards. An assembly which was then held is described in a law report of the reign of Edward III¹ as a Parliament. It was not, nor was it represented as being a Parliament in the modern sense, but it was that kind of Parliament to which the term has for centuries been applied when reference was made to the judicial functions of the House of Lords.

A 'Parliament' of William the Conqueror: its judicial functions.

On May 31, in the fifteenth year of the Conqueror's reign, was decided a very important cause arising out of a dispute between the Abbot of Bury St. Edmund's and Arfastus or Herfastus, Bishop of Thetford, to the effect that the Bishop could not exercise the rights of Ordinary over the Abbot. The judgement was then embodied in the form of a charter with a recital of the proceedings², the names of various persons being appended as those of witnesses.

The persons who were present in the 'Parliament' are described in the later law report as 'the Archbishop of Canterbury, and all the other Bishops of the land, Earls, and

Its constitution: Archbishops,

¹ Year Book, 21 Ed. III, fo. 60 (No. 7).

² The instrument has been printed several times. It appears in the editions of Dugdale's *Monasticon Anglicanum*, and in the recently published *Memorials of St. Edmund's Abbey* (Rolls Series) vol. i. pp. 347-50. The charter itself was, in the form of attestation, not unlike those immediately preceding the Conquest, and there is one (of the year 1021) to the same Abbey which is very similar, though no Chancellor there appears. It is the recital of the judicial proceedings and judgement by 'Parliament' (as the assembly is styled in the Year Book) which gives importance to the Conqueror's charter to the Abbey of Bury. The proceedings are described in the *Memorials*, i. 65-67.

CHAP. III. Barons,' though they were not described precisely in those words in the charter itself. In one part of the charter they appear as the Archbishops of Canterbury and York, Odo (the King's half-brother), Bishop of Bayeux and Earl of Kent, several other Bishops, the King's son Robert and 'other *principes* of our realm (*regni nostri*).' In another part they are mentioned as 'Archbishops, Bishops, Earls, and other our faithful knights (*aliorumque militum nobis fidelium*).' The King himself impressed the sign of the cross upon the charter in token of confirmation. The witnesses were the Queen, Matilda, the Archbishops of Canterbury and York, Odo, Bishop of Bayeux, and the Bishop of Coutances, the Bishops of London, Winchester, Worcester, Lindisfarn (or Holy Island), 'Bath,' Exeter, Chester, Thetford (party in the cause), Rochester, Salisbury, and Hereford, and the King's three sons, Robert, William, and Henry. All of these added some word of agreement, consent, or approbation. The Chancellor, Maurice, added that he had read the document and sealed it. The following witnessed the instrument without further remark: the King's chaplain, the Abbots of St. Augustine's (Canterbury), Chertsey, Westminster, Glastonbury, Evesham, Ramsey, and Peterborough (who for the most part bore English names); Roger, Earl of Montgomery; Hugh, Earl of Chester; Alan, Earl of the East Angles; Aubrey, Earl of the Northumbrians; Robert de Beaumont, and Hugh de Montfort. Richard, son of Earl Gilbert, added the word *consignavi*, and following him, without comment, are his brother Baldwin, Henry de Ferrers, Hugh de Grentmesnil, and Walter Giffard.

It is not certain that the whole of these witnesses were present in the Council or 'Parliament;' but all those who were present were regarded as being either Prelates or *Principes* (who were also knights); and these *Principes* were, in the time of Edward III, understood to be Earls and Barons. The Conqueror in his charter describes himself as King of the English and *Princeps Normannorum*. He was a *Princeps* in relation to the crown of France. The lay members of his Council, perhaps the whole of the members

Bishops,
Abbots,
Earls, and
other
Principes
of the
Realm, or
Proceres.

(for that is a question of construction), were *Principes* of his Realm, and, although the expression 'Peers of the Realm' had not yet come into use in England, it is not difficult to see how the *Principes* of the realm of one reign became the Peers of the realm of another. In the writ¹ which followed the judgement and was addressed to Roger Bigod as Sheriff, the assembly is described as having consisted of the 'Archbishops and Bishops, Abbots and Earls, and other my *Proceres*.' In later times, and down even to the present day, the Latin equivalent for the House of Lords has been *Domus Procerum*.

Though the Council or 'Parliament' which heard and determined the cause may have included persons whose names do not appear as witnesses to the charter, and though it is possible that some of the witnesses to the charter may not actually have sat in the Council or 'Parliament,' there is no reason to suppose that the two classes were very widely different. One of the most remarkable facts to be observed in the list of persons is that some are identical with those who attended William's Council in Normandy before the final decision was taken to risk the invasion of England. Both Odo, Bishop of Bayeux (and now Earl of Kent), and Roger, Earl or Count (*Comes*) of Montgomery, had given their advice in favour of the undertaking, and Walter Giffard was, if not the same person, a son of the Walter Giffard who was present on that occasion². These and others had now become English nobles, as possessing English lands, and were among the *Witan* of the King of England, as they had been and still were among the Council of the Duke of Normandy. Thus the first assembly in England to which the word 'Parliament' has been applied by any legal authority, was an assembly resembling the House of Lords in its constitution, but consisting largely of foreigners.

Foreigners
were now
of the
nobility of
England,
and de-
scribed as
Witan.

¹ Printed in *Memorials of St. Edmund's Abbey* (Rolls Series), vol. i. p. 350.

² Gul. Pict., *Gesta Guillelmi Ducis*, p. 197; Wace, *Roman De Rou* (ed. Pluquet), 11124-11130.

CHAP. III.

The
Witan,
 baronage,
 or Parlia-
 ment,
 chiefly
 foreigners
 in the
 reign of
 Henry I.

When all the Earls and greater Barons, and most of the Bishops were foreigners, the Abbeyes and Priories could not long retain native Heads. Many vacancies had occurred during or before the reign of Henry I, and had not been filled up; but when that King was about to embark for Normandy in the year 1114 he bethought him of making good the omission. It is expressly stated that what he did was done by the advice of his Bishops and *Principes*. The Bishops and *Principes*, not being of English extraction, did not wish men of English extraction to be advanced to high places. All the new Abbots were foreigners, not one of English birth. If any man was an Englishman, piteously complains the chronicler of the day, no merit could aid him to be considered worthy of any honour. If any man was a foreigner, he was straightway thought worthy of the highest honours of all ¹.

Thus the King's Council, his *Witan*, his baronage, and, according to the ideas of a somewhat later time, his Parliament, had almost wholly ceased to be English. He had advisers of the same class as Ethelred II, but advisers who were in a different position with regard to the lower population. They were the foreign advisers of a foreign king ruling a subject people, the ruler and the ruled speaking different languages, and having no sympathies in common.

The upper classes by degrees adapted themselves to the situation. They learned to speak French, intermarried with their rulers, had their children baptized with names imported from France, and at last became indistinguishable from the French themselves. This fusion among the higher ranks is said to have been complete towards the end of the reign of Henry II, though it had not affected the serfs, villeins, or unfree people, who retained their native language². In their case the difference of race did not cease to be recognized until the reign of Edward III, when the 'Presentment of Englishry,' the last badge of subjection, was abolished³:

¹ Eadmer, *Hist. Nov. in Angl.* (Rolls Series), p. 224.

² *Dialogus de Scaccario*, lib. i. cap. 10.

³ 14 Ed. III, stat. 1. cap. 4.

CHAPTER IV.

THE KING'S COURT OR *Curia Regis*: 'PARLIAMENT': COUNCILS AND THEIR SUB-DIVISIONS.

TO the *Curia Regis*¹ (or King's Court) may be traced a great part of our early constitution. The expression, however, was used in various senses, and the institution developed in various directions. The King was, in the early days after the Conquest, as well as before it, in the habit of holding his Court (in *Englisc* his *hired*) at different places and times, though usually the times were coincident with the three great festivals of the Church. The Court was an assemblage of the principal persons of the realm, lay and ecclesiastical—of the Earls and Barons, of the Bishops and Abbots, and of the great officers of state. Its meeting was the opportunity for them to pay respect to the Sovereign, as at a modern Court, though many kinds of business were also transacted. It is often indistinguishable from the *Commune Concilium*, or the '*Englisc*' Witenagemot, at which advice might be taken, and aids granted. It was moreover a Court in the legal sense of a Court of Justice².

CHAP. IV.

The *Curia Regis* or King's Court: Royal Court, and Court of Justice.

¹ With regard to judicature it is not unusual to find *Aula Regis*, or *Aula Regia*, used by modern writers as a synonym for *Curia Regis*. The *Aula* was at most but a small part of the *Curia Regis*, in any of its senses, and had relation to the household of the King. There are still extant *Placita Aulae* of various reigns. The proceedings were before the Steward and Marshal of the Household.

² In the *Reports from the Lords Committees, touching the Dignity of a Peer of the Realm*, vol. i. p. 20, it is suggested that 'the Supreme

CHAP. IV. In the latter sense it was a Supreme Court, having within itself the powers of a court of first instance, of a court to which causes could be removed from courts below, and of a court of error or appeal. It had, in an inchoate form, all the functions subsequently divided between the Court of Common Pleas, the Court of King's Bench, the Privy Council, the Exchequer Chamber, and the House of Lords. The Court of Exchequer seems to have been distinguished in very early times from the King's Court as a whole, because when not mentioned simply as the Exchequer, it is described as the King's Court at the Exchequer¹. The Chief Justiciary, however, sat there as well as in other courts. The time at which the division of jurisdiction (apart from that of the Exchequer) began is not easily to be fixed with precision. It can, however, be shown to have begun much earlier than the date usually assigned—than the granting of *Magna Charta* by King John.

Cases
heard in
the King's
Court or
'Parliament,'
William I
to Henry I.

We have already seen how the King's Court, or *Curia Regis*, was exercising judicial functions in the reign of the Conqueror, and how the lawyers of the reign of Edward III were unable to distinguish it from a Parliament. In the year 1096, William II and all his *Optimates*, or *Witan*, were at Salisbury, where Geoffrey Bainard accused William de Eu of conspiring against the King. The fact was decided by battle, and the King passed sentence against the offender². Rufus also held his Court for the first time in the new Hall at Westminster in 1099³. In the reign of Henry I it is found that the Earls and Barons of all England assembled at Salisbury in the year 1116, and there heard the cause

Court of Justice denominated *Curia Regis* 'was the King's 'Select Council'—a small body chosen by the King, and consisting, in the main, of the judges and great officers of State. Sufficient evidence will be adduced in the following pages to show that the original *Curia Regis* was not so limited, and that the real fountain of justice was the *Commune Concilium Regni*, which afterwards became 'the King in his Council in his Parliament.'

¹ *Curia Regis ad Scaccarium*.

² A. S. Chron., A. D. 1096. Hoveden (Rolls Series), vol. i. p. 151.

³ A. S. Chron., A. D. 1099.

between the Archbishop of Canterbury and the Archbishop elect of York¹. In the year 1123 the King held a Court, Council, or, as the native writer calls it, *gewitene mot*, at Gloucester in which was elected an Archbishop of Canterbury (William de Corbeuil), though apparently there were many dissentients, including Earls and Barons. In the year 1124 King Henry I was in Normandy, but in his absence a *gewitene mot* was held under Ralph Basset (presumably Chief Justiciary), at which sentence was passed on a great number of thieves, of whom forty-four were hanged and six mutilated².

Up to this point it is, perhaps, equally difficult to prove and to disprove that there was any division of jurisdiction, except in so far as Justices in Eyre or Justices Itinerant may have carried a delegated authority into the shires. Legal or constitutional reforms were hardly possible during the disturbed reign of Stephen. In the time of Henry II, however, it may be considered certain that the whole of the functions of the *Curia Regis* were not discharged by one undivided Court. Still there are instances in this, as indeed in subsequent reigns, in which the King's Court is seen to be constituted as the full King's Court had been continuously since the Conquest. A famous meeting at Clarendon in the year 1164, at which the Earls and Barons were present, and from which Becket, Archbishop of Canterbury, withdrew, is distinctly called the *Court*³. In the same or following year King Henry II assembled a *Great Council* at Northampton, but the Archbishop sent to the King a message that he would not come to the *Court* except under special conditions. On the morrow of the meeting, however, he came to the King's *Court*, in his chapel, and was then required by the King to answer charges made against him. In the end the Barons of the King's *Court* (*Curiae Regis*) adjudged him to be in the King's mercy⁴.

Judicial
functions of
the *Curia
Regis* in the
reign of
Henry II:
indications
of division.

¹ Hoveden (Rolls Series), vol. i. p. 170.

² A. S. Chron., A. D. 1123 and 1124.

³ '*Recessit Archiepiscopus a Curia*,' Hoveden (Rolls Series), vol. i. p. 222.

⁴ Hoveden (Rolls Series), vol. i. pp. 224-225.

CHAP. IV. During all or a portion of this time, however, there is some reason to believe that delegates from the King's Court were sent into the shires, partly, perhaps, in aid of the local jurisdictions, partly, perhaps, to check them. In France, if not in England, a similar practice had existed since the time of Charlemagne, and, if it was unknown in England before the Conquest, it could hardly have failed to be introduced soon afterwards. As there are no judicial records earlier than the reign of Richard I, and no Exchequer records between Domesday Book and the Great Roll of the Exchequer of 31 Henry I, the point must always remain in some obscurity. There are, however, in the Great Roll of Henry I some indications of the Eyres, which are known to have been definitely established in the reign of Henry II. It is there apparent that one of the persons who holds pleas (G. de Clinton)¹ travels over no less than twelve counties. The names of others appear in as many as six counties. So also in the time of Henry II, before the famous Assize of Northampton in 1176, there are entries in the Great Rolls of the Exchequer which it is difficult to explain otherwise than by the assumption that Justices were sent from the King's Court into the counties, as *Missi*, Justices Itinerant, Justices Errant, or Justices in Eyre. Numerous instances have been collected which appear to show the existence of these *Missi*, or Justices in Eyre, in the twelfth, thirteenth, and fourteenth years of the reign². In the sixteenth year (1170) some 'Barons in Eyre'³ were sent (*Missi*) into the several counties to make enquiry as to the conduct of Sheriffs. Among them were an Earl and two Abbots⁴.

Delegation
from the
King's
Court;
early origin
of the
Justices in
Eyre.

¹ He appears to have acted as Chief Justice under some Commission, as the pleas are sometimes described as *Placita G. de Clintona*, sometimes (e.g. in the part of the roll relating to Yorkshire) as *Placita G. de Clintona et Sociis ejus*.

² The *Great Rolls of the Exchequer*, under the heads of the several counties in the years mentioned. The passages are cited in the notes to Madox's *History of the Exchequer*, cap. iii. § 10, *ad fin.*

³ *Barones Errantes*.

⁴ Gervase of Canterbury (Rolls Series), A. D. 1170. The instructions

In the year 1176, we are told, the kingdom was divided into six parts, to each of which were to be sent three Justices, or eighteen in all. This, indeed, is the date commonly assigned to the creation of Justices in Eyre, though it is clear that there were *Missi* long before. On this occasion, however, if not on previous occasions, the appointment was in very solemn form, the King holding a 'Great Council' touching the laws or statutes of his realm, at which were present the Archbishops, Bishops, Earls, and Barons of the Realm, and the decision was taken by common counsel of them all ¹.

CHAP. IV.

The
eighteen
Justices in
Eyre, and
six Circuits
of the year
1176.

In the absence of contemporary judicial records, it is impossible to form a sound opinion as to the conduct of these eighteen Justices. The Eyre, so far as the Crown part of its jurisdiction was concerned, was always unpopular, and complaints appear to have been made before the year 1178. In that year Henry II, having returned from abroad, 'made enquiry touching the Justices whom he had appointed in England, and whether they had treated the people of the realm well and with moderation. He learned that the realm and the people had suffered grievances through the great multitude of Justices, they being eighteen in number. Then, by advice of the *Sapientes* (*Witan*) of his realm, he chose five only, two ecclesiastics and three laymen, and these were all of his private household. And he ordained that these five should do right, and should not depart from the King's Court, but should remain there to hear all the claims or complaints of the people. Nevertheless, if any question should come before them which could not be brought to an end by them, it was to be presented to the King's hearing and determined as should please him and the *Sapientiores* (*Witan* or wise men) of the realm' ².

The Eyre
of 1176
terminated;
five
Justices
appointed
to hear the
plaints of
the people
in 1178.

Thus the particular Eyres of the year 1176 were brought

to enquire are printed also from Rawl. C. 641, in Bishop Stubbs's *Select Charters*, p. 148.

¹ Bened. Abb. (Rolls Series), vol. i. p. 107; Hoveden (Rolls Series), vol. ii. pp. 87-8.

² Bened. Abb. (Rolls Series), vol. i. p. 207. A portion of this

CHAP. IV. to an end, to be succeeded from time to time by new Eyres under new Commissions. It will be observed that the five Justices of the King's Court appointed at this time are not said to have any authority in Crown matters. They are only to hear the claims or plaints of parties, and not even to determine the plaints if any special questions should arise. Here, to all appearance, the Court of Common Pleas comes into being. It is, at any rate, in being here. The disputes between party and party are to be brought not before the King and his Witan, or Common Council, in the first instance, but before his Justices. Through the Court of the Eyre the public had already become familiar with the idea of a delegated jurisdiction, away from the King's Court, in pleas both civil and criminal. By the appointment of Justices to sit in the King's Court and hear causes between plaintiff and defendant, or between demandant and tenant, they became familiar with another though similar kind of delegation.

The Court of Common Pleas (with a jurisdiction delegated from the *Curia Regis*) now practically in existence.

But still moveable with the King's Court.

The Justices in Eyre were sent partly, it is true, for Crown purposes, but partly in aid of the local jurisdiction for civil causes. It would obviously be inconvenient for the King and all his Court of Archbishops, Bishops, Earls, and Barons to hear every small cause which might commence in the *Curia Regis* or be removed into it from local courts. Consequently, when there were no Eyres in Commission, it was a very natural idea that causes which were not

passage has been frequently used with the object of proving a totally different argument, which it in no way warrants. Mr. (afterwards Sir Thomas) Hardy in his Introduction to the Close Rolls, p. xxv, says 'the Court of Judicature which sat in the *Curia Regis* or the King's Court is also presumed to have been instituted by the same Prince [Henry II] in consequence of complaints made to him of the partiality of the *Justiciae* residing in his Court, the number of whom he reduced from eighteen to five, and enacted 'quod illi quinque,' &c., as above. *Resiant* is a technical word not exactly applicable to Justices in Eyre. It is strange that neither Mr. Hardy, nor the many writers on the *Curia Regis* who have copied him, should have perceived that the eighteen Justices were the Justices in Eyre, and that no other eighteen are mentioned by Benedictus Abbas.

of exceptional importance should be heard by persons CHAP. IV.
deputed for the purpose. There is not the slightest indication in the words used, that these deputies or Justices were to remain in any fixed spot. They were to remain in the King's Court and not depart from it. As the King's Court was moveable so also must they have been, but they were not to move independently, as Justices in Eyre. This was, no doubt, a great inconvenience, and finds its place in that part of King John's *Magna Charta* which provides that Common Pleas are not to follow the King's Court. The Justices, however, who were not to move except with the King's Court, were, there can be little doubt, those who were soon after called 'the Justices of the Lord the King of his Bench'—'the Bench' meaning invariably not, as might be supposed by laymen rather than lawyers, the King's Bench, but the Common Bench or Court of Common Pleas.

About the time of the appointment of the Justices in Eyre by Henry II in 1176, and even a little earlier, it becomes apparent that there were also Justices of the *Curia Regis* as distinguished from the ancient *Curia Regis* regarded as a whole. Many of them were the same persons as the Justices in Eyre, but were clearly acting in a different capacity, and not acting solely within the limits assigned to them respectively in their circuits as Justices in Eyre. Thus, in Yorkshire pleas, William Fitz-Ralph, Bertram de Verdun, and William Basset¹ acted as Justices of the *Curia Regis* in 1176, whereas Ranulf de Glanvill, Robert de Vaux, and Robert Pikenot were the Justices in Eyre for the same county². So also, in the pleas of Buckinghamshire and Bedfordshire. Fitz-Ralph, Verdun, and Basset are found to be Justices of the *Curia Regis* even in the preceding year³.

In 1176 there were Justices of the *Curia Regis*, distinguished from the *Curia Regis* as a whole, and from the Justices in Eyre.

¹ *Great Roll of the Exchequer*, 22 Hen. II, Yorkshire; and again the Roll of 23 Hen. II (both cited by Madox, *Hist. Exch.*, cap. iii. § 5, notes).

² *Ib.*; Bened. Abb. (Rolls Series), vol. i. p. 108.

³ *Great Roll of the Exchequer*, Bucks and Beds, 21 Hen. II (cited by Madox, as above).

CHAP. IV. and the same persons (Verdun and his companions) again in 1176¹, whereas the Justices in Eyre for those counties were in 1176 Walter Fitz-Robert, Hugh de Cressi, and Robert Mantell².

The Eyre of 1179 : the Lord High Treasurer and a Bishop among the Justices.

The creation of a limited *Curia Regis* as distinguished from the whole Court known by that name was, therefore, not as has sometimes been supposed, merely the outcome of the suppression of the Eyres of 1176. Those Eyres in fact had barely been ended before new Eyres were put in commission. In the year 1179 the kingdom was divided not into six, but into four circuits, and Justices to the number of no less than twenty-one were divided among the four districts—six Justices to one, and five to each of the others. The names are of singular interest as showing how some, though not all, of the Justices in Eyre must have been members also of the great *Curia Regis*, while others apparently were not qualified to be members, unless indeed there was already arising a Council within a Council. In three out of the four circuits a Bishop presided, in one of the three the Treasurer was one of the Justices, in the second the King's Chaplain, and one of the King's Clerks, and in the third also one of the King's Clerks. There is nothing to show that the other Justices in these three divisions were Bishops, Abbots, Earls, or Barons.

The Justices of one Circuit were the Justices of Common Pleas.

The fourth division, however, was the most remarkable of all. There were in it six Justices, not one of whom appears to have been Bishop, Abbot, Earl or Baron, and of these six it is said that they were also appointed Justices in the King's Court (*Curia Regis*) to hear the claims or complaints (*clamores*) of the people³. The Justices to hear the claims of the people can only be, under another name, the Justices to hear Common Pleas, as distinguished from those who had jurisdiction in Pleas of the Crown. As

¹ *Great Roll*, 22 Hen. II, Bucks and Beds (cited by Madox, as above).

² The same *Great Roll*; also Bened. Abb. (Rolls Series), vol. i. p. 107.

³ Bened. Abb. (Rolls Series), vol. i. pp. 238-9; Hoveden (Rolls Series), vol. ii. pp. 190-1.

Justices in Eyre in the Northern Counties the six would have both jurisdictions. As Justices of the King's Court to hear the complaints of the people they had only one. CHAP. IV.

Shortly afterwards Ranulf de Glanvill, who was one of these six Justices, became Chief Justiciary (in A.D. 1180)¹, and partly from what has been told of him, partly from what he has told us himself, it is possible to discern the Court *Coram Rege*, afterwards known as the King's Bench, having by delegation a distinct existence apart from the Court of Common Pleas. In the year 1184 it would seem that the expression *Coram Rege* (before the King) no longer signified necessarily before the King in person. In that year one Gilbert de Plumpton was accused of felony *Coram Rege*. In this case the action of the Court is clearly seen to be distinguished from that of the King. Plumpton was condemned either by or at the instigation of Glanvill, who was his enemy. The King, however, afterwards remitted the capital punishment by advice². The King's Court *Coram Rege* still followed the King, and was held in the place in which he might happen to be. He was often, no doubt, present in Court, but not always, and his presence was perhaps beginning to become one of the fictions of the law, though the Court of King's Bench was always known as 'the Court of our Lord the King before the King himself.'

Indications of the existence, by delegation, of the Court *Coram Rege* (afterwards known as the King's Bench) in 1184.

In the year 1187 (the thirty-third year of the reign of Henry II) the Court of Common Pleas was also in existence still more plainly than in previous years, as will be apparent to any one who is familiar with the style of the Court, and with its jurisdiction. It was always known as 'the Court of our Lord the King of the Bench,' and its Justices as 'the Justices of our Lord the King of the Bench.' The expression

The delegated jurisdiction of the Court of Common Pleas, as described by Glanvill in 1187.

¹ Hoveden (Rolls Series), vol. ii. p. 215.

² Hoveden (Rolls Series), vol. ii. p. 286. His diction is a little obscure. The story is somewhat differently told by Benedictus Abbas (Rolls Series), vol. i. pp. 314-317. The latter makes Glanvill exhort those who were to give judgement in the case to pass sentence of death. In either case the King was not present at the trial.

CHAP. IV. 'King's Bench' does not seem to have been known before the reign of Edward I. The Common Bench in later times had jurisdiction in real actions, and it was the Court in which fines of land were levied. So also it was, though not with an exclusive jurisdiction, in 1187, according to the testimony of Glanvill himself. The 'concord' or the 'fine,' which was to be the end of the proceedings in any action, was to be put into writing by mutual consent of the parties; it was to be brought before the Justices of the Lord the King sitting¹ on the Bench; and a counterpart was to be delivered, in the presence of the Justices, to each of the suitors. The form of the concord is set out and is obviously the foundation of the fines of lands of later date. The concord might be made in the King's Court, or made elsewhere, and afterwards recorded and enrolled in the King's Court; but the King's Court was, in both cases, not the full *Curia Regis* of previous reigns and of the early part of the reign of Henry II, but the King's Court of the Bench, before the King's Justices of the Bench. When the final concord was made in the King's Court, it was, according to the form given by Glanvill, made before the chief Justiciary and four persons named, together with some others. When it was made elsewhere, it was to be recorded in the King's Court at Westminster before persons named (two Bishops and the Chief Justiciary, in the form given) being then and there present. There is no longer any suggestion that the King in person and all the Bishops, Earls, and Barons constituted the Court. The Court was the Court of Common Pleas, of which the Justices might or might not have been trained lawyers, but of which, except in exceptional cases to be hereafter noticed, the number of Justices might be limited². It differed from the later Court of the same name chiefly in the fact that one of its constituent members was the Chief

¹ *Residentibus*. This was the term commonly used at the time to express 'sitting,' not necessarily, as has been sometimes supposed, residing.

² Glanvill, lib. viii. caps. 1, 2, 3.

Justiciary who presided also over the Court *Coram Rege*, and that the Court *Coram Rege* and even the Exchequer seem also to have had a concurrent jurisdiction.

In these times the Fine of Lands was regarded not as the conclusion of a fictitious action on a writ of covenant, but as an agreement between the parties in an action which had really been commenced and come into Court. A similar agreement might at this time be made in actions other than those relating to land¹, and might be made in the Court *Coram Rege*; and the distinction between the two Courts is again clearly drawn by Glanvill. 'Whatsoever anyone has acknowledged that he has to do, whether *Coram Domino Rege* (that is to say, in the Court subsequently known as the King's Bench) or in the Common Bench (*Coram ejus Justiciis*). thereof let him keep his engagement².' The two Courts taken together were distinguished by Glanvill from the Court before the Justices in Eyre as the Head or Chief Court of the King³. The two branches, however, not only were, but continued to be distinct ever afterwards. In the Eyre Rolls of the reign of Richard I (to which the name of *Rotuli Curiae Regis* was assigned by some person who made a calendar of them long ago, and whose error has been perpetuated to the present time) there is frequent mention of 'the Bench,' the invariable title for the Common Bench or Court of Common Pleas⁴.

A cause of confusion has arisen from the fact that in Glanvill's time, and subsequently, the King's Court (*Curia Regis*) was commonly mentioned in contradistinction to the County Court or Court of the Sheriff. Glanvill, in fact, uses as the heading of his first book the words 'Of the pleas which belong to the King's Court or to the Sheriff.' The expression 'the King's Court' has generally been supposed to mean a single and indivisible Court. It is

The
Capitalis
Curia
Regis of
Glanvill,
and its two
divisions,
Coram
Domino
Rege,
and *Coram*
Justiciis.

Glanvill's
distinction
between the
jurisdiction
of the
King's
Court and
that of the
Sheriff.

¹ Glanvill, lib. viii. cap. i.

² *Ib.*, lib. viii. cap. 5.

³ *Ib.*

⁴ *Rot. Cur. Reg.* (ed. Palgrave), vol. i. 217, &c.

CHAP. IV. clear from the evidence given above, that this is not the meaning. Such an interpretation would be as little warranted as would be the interpretation that 'the Sheriff' means only one Sheriff with one Court. The respective jurisdictions of the two Courts (*Coram Rege* and *Coram Justiciis*) may not have been so sharply defined in Glanvill's time as in the time of Edward I—could not have been, indeed, when the same Justiciary sat in both. Yet this very fact illustrates the growth of the two Courts and explains how in later times a writ of Error lay from the Court of Common Pleas to the Court of King's Bench over which the Chief Justice of England presided.

The jurisdiction of the Common Bench inferior to that of the King's Bench, and to that of the Eyre.

The inconvenience of the Common Pleas following the King's Court, or, in other words, of the Court of Common Bench sitting only when and where the King held his Court (the word Court being used in more senses than one) was felt and remedied before the time of John's Great Charter. It was remedied, to some extent, by the appointment of Justices in Eyre, who heard common pleas as well as pleas of the Crown. They, as delegates from the King's Court to carry justice into the Shires, took with them the full jurisdiction. The Court of Common Pleas was inferior to the Court of the Eyre, just as it was inferior to the Court of King's Bench. When the Eyre was in any county, the jurisdiction of the Common Bench immediately ceased in that county, and the common pleas of the county were at once removed into the Court of the Eyre.

The full *Curia Regis* still hears causes of great importance; Case of the Kings of Castile and Navarre in 1177.

The King's Court itself, however—the full Court—appears to have still retained its original constitution for occasions and causes of great weight and moment. In the year 1177 the Kings of Castile and Navarre submitted their disputes to the judgement of the 'Court of the King of England.' This Court, to which the term 'General Council' was also applied, consisted, when it first assembled, of the Archbishop of Canterbury, several Bishops, and Abbots, Priors, Earls, and Barons of England. The disputants were required to put their respective cases in writing, because, until that was done, 'neither the King nor the Barons of

the Court' could understand the matter of complaint. CHAP. IV.
 Afterwards, 'the Earls and Barons of the Court of the King of England'¹ gave judgement, which was embodied in the form of a charter, just as decisions in the Court, Council, or Parliament of the Conqueror had been embodied before. The Charter was described as a 'Charter of Henry, King of England, touching the judgement given in his Court between the King of Castile and the King of Navarre².' It was attested by the Archbishop of Canterbury, fourteen Bishops, seven Earls, nine Barons named, and others of the clergy and laity.

Even when there began to be other Justices besides the Chief Justiciary and the Justices in Eyre, the Barons might still constitute a part of the King's Court. Thus when Robert de Aubeney quit-claimed, released, or surrendered Didcot to Henry II, it was 'in the King's Court at Westminster, before the King and his Barons and Justices then and there present³.'

Barons still occasionally sat in the Courts with delegated jurisdiction.

The Court of Common Pleas (the Court before Justices and not before the King himself), also retained for a time some of the characteristics of the old undivided *Curia Regis*, when cases of exceptional importance were to be heard, or concords or fines of exceptional importance to be recorded. Thus in the ninth year of the reign of Richard I, in a case in which a demand was made against the Prior and Convent of Christ Church, Canterbury, and considerable interests were involved, there were not only Justices constituting the Court, as well as the Chief Justiciary, but also an Earl and various Barons and others of the King's lieges. A concord or fine was made *Coram Justiciis*, but not *Coram Rege*. Here the Court was the King's Court, but the Court of his Bench. though Barons

An Earl and Barons in the Court of Common Pleas in the reign of Richard I.

¹ *Comites et Barones Regalis Curiae Angliae*.

² Benedictus Abbas (Rolls Series), vol. i. pp. 138-154; Hoveden (Rolls Series), vol. ii. pp. 120-131.

³ This appears from a recital of a charter produced in Court in the eighth year of the reign of King John. Printed *Placitorum Abbreviatio*, 54 b.

CHAP. IV. again sat as they had sat in the original King's Court of old ¹.

The full *Curia Regis* or Common Council of the Realm, acting as a Court superior to the more limited *Curia Regis* in the reign of John.

The distinction between the old and full *Curia Regis*, however, and the Courts *Coram Rege* and of the Bench was, in the reign of King John, becoming marked by the use of the Council of the Realm, which was in fact the ancient full *Curia Regis*, as a superior Court—if not a Court of Appeal, certainly one into which causes could be removed from the Courts or branches below. It was laid down by Glanvill that all actions touching Baronies must be tried in the King's Court ². In the reign of Henry II a convention, agreement, or fine had been made touching a Barony, but not in the King's Court. The person who had agreed to the transfer, afterwards, in the reign of King John, redemanded the Barony on this ground, in the King's Court. The matter was not then settled in ordinary form but by the Council of the Realm and the will of the King ³.

Various senses in which the terms *Curia Regis* and Council are used in Chronicles and Records.

In the division of functions now becoming manifest there appears also, not perhaps unnaturally, a great confusion of terms, a confusion from which even the records are not free, but which is most conspicuous in the writings of the Chroniclers. The King's Court is a term used sometimes to express the Common Council of the Realm, sometimes the King's Council, sometimes the Court *Coram Rege*, afterwards called the King's Bench, and sometimes the Court of Common Pleas. The Council means sometimes the Common Council of the Realm, sometimes a Court sitting to hear causes which it might have been supposed would be brought before the Court of King's Bench or the Court of Common Pleas and sometimes a committee of the Common Council of the Realm appointed to consider petitions.

¹ Printed in Madox's *History of the Exchequer* (cap. iii. § 7, note), from one of the original Feet of Fines among the archives of Christ Church, Canterbury.

² Glanvill, lib. i. cap. 3.

³ Hoveden (Rolls Series), vol. iv. pp. 117-8.

It was established, as already mentioned, in 1178, that the permanent Justices of the Common Bench, or those who had to hear the ordinary causes between party and party, were not to proceed in important or difficult cases without referring the matter to the King and his *Sapientes* or *Witan*. On these occasions the Court would naturally be reinforced by members of the fuller *Curia Regis*, which had merely delegated its functions in relation to minor causes. In like manner the functions of the Court *Coram Rege*, afterwards called the King's Bench, were not at first absolutely severed from the full *Curia Regis*. Thus, even in the reign of Henry III, when an advowson was given and granted to the Bishop of Bath in frank-almoign, this was done *Coram Rege et Magnatibus*, and seisin was given *Coram Rege* by a pair of gloves¹.

CHAP. IV.

The severance of the Courts of King's Bench and Common Pleas from the full *Curia Regis* long incomplete; though commencing earlier than commonly supposed.

In the time of Henry III, the Council, not qualified by any epithet, is seen to be exercising various functions, some perhaps, peculiar to itself, others of the same nature as those exercised by the Court of King's Bench, and the Court of Common Pleas. In the twenty-first year of the reign there are records of cases before the Lord the King at Worcester. In one of these² it was pleaded, under Magna Charta, that Common Pleas ought not to follow the King, from which fact it is clear that the distinction between the Court *Coram Rege*, and the Court of Common Pleas was fully recognized. In another case the decision appears to have been given by the King and his Council under the head of the Court *Coram Rege*³. In the twenty-seventh year of the reign the Council, without any mention of the King, takes cases of *Quo Warranto*⁴. The Archbishop of York and the Council, in the same year, deal with an action of

'The Council,' the 'Whole Council,' and the Court *Coram Rege*; records of cases before these tribunals on the same rolls in the reign of Henry III.

¹ *Rot. Lit. Pat.*, 10 Hen. III, m. 5. Printed in Madox's *Hist. Exch.*, cap. iii. sec. 7, note.

² *Placita coram Rege*, 21 Hen. III, R^o. 3, printed in the *Plac. Abbr.*, p. 105 a.

³ *Ib.*, in relation to a claim of the King of Scotland, touching the Earldom of Huntingdon.

⁴ *Placita coram Concilio Domini Regis*, 27 Hen. III, R^o. 2, printed in the *Plac. Abbr.*, p. 118 b.

CHAP. IV. assise¹, and with some real actions between party and party, as well as with cases of *Quo Warranto* and various matters in which the King was interested². In the thirty-eighth year the Council hears (among others more immediately affecting the Crown) a number of cases of trespass and of offences against the peace which might in later times have been determined in the Court of King's Bench³. In the fifty-sixth year of the reign there were pleas *Coram Rege* (the style of the Court of King's Bench of later reigns), and among them occurs a case in which a writ was directed to the Justices of the Bench (Common Pleas) requiring them to send the records of two cross actions which were before them to the King. They sent the records before the King and his Council. The parties afterwards came before the King and Council, by whom judgement was given⁴.

In the forty-third year of the reign is a remarkable intermixture of the Court *Coram Rege* or King's Bench, 'the King's Council,' and 'the King's whole Council.' In an assize of Novel Disseisin it appeared that the King's interests might be affected. The cause was adjourned in order that the King might be consulted, and a day was given, *Coram Rege ubicumque*, &c. On the appointed day the King 'before his Council'⁵ at Westminster acknowledged and recorded certain matters. There was again an adjournment, and a day was again given *Coram Rege ubicumque*, when the plaintiff appeared in the King's presence. There were further adjournments, and at length the plaintiff came before the whole Council of the King⁶, and prayed seisin. It was then ordered that the rolls of the Exchequer should be searched as to certain facts, and that the *Magnates*

¹ *Placita coram Concilio Domini Regis*, 27 Hen. III, R^o. 3 d, printed in the *Plac. Abbr.*, p. 118 b.

² *Ib.*, R^{is}. 7-24, printed in the *Plac. Abbr.*, pp. 119-20.

³ *Ib.*, Mich., 37-38 Hen. III, R^{is}. 5-11, printed in the *Plac. Abbr.*, pp. 129-131.

⁴ *Placita coram Rege*, Hil., 56 Hen. III, printed in the *Plac. Abbr.*, p. 182 a, b.

⁵ *Coram concilio ejus.*

⁶ *Coram toto concilio Domini Regis.*

of the Council should be certified thereon, and there was again an adjournment *Coram Rege ubicumque*¹, or into the King's Bench, as the Court was subsequently called. CHAP. IV.

The proceedings of the Council, indeed, seem to be indistinguishable from those of the Court *Coram Rege* or King's Bench. In the forty-fifth year of the reign of Henry III, among a number of cases headed 'Pleas before the Lord the King,' it appears that Isabella de Fortz, Countess of Albemarle, comes before Hugh le Despenser, the King's Chief Justiciary, and other Magnates of the Council of the Lord the King, and there prefers her claim to a wardship. Judgement was given in her favour².

In the time of Edward I, 'the whole Council' was stated to include, though not to consist exclusively of, the Chancellor, the Treasurer, the Justices of the two Benches, and the Barons of the Exchequer³. In a roll of pleas, *Coram Rege*, of the thirty-third year of that reign, James, formerly Seneschal or Steward of Scotland, acknowledged a certain instrument to be his deed, before the Chancellor of England, the Chief Justice of England, the Justices of the two Benches, the *locum tenens* of the Treasurer, John de Berewyk, and several others of the King's Council, and the Barons of the Exchequer⁴. So also in the reign of Edward I.

We know from a different source⁵ that 'the Court of the King in his Council in his Parliament,' was now in existence, and that in it sat Prelates, Earls, Barons, *Proceres*, and other learned persons. There doubts respecting judgements were determined, there new remedies were established for new wrongs, and there justice would be awarded to every one according to his deserts. A truly perfect Court! From the same source we know that the Court of King's Bench, though recognized as a separate Court, still had only an inferior jurisdiction, which was, to The Courts of the King in his Council in his Parliament, and of the King's Bench, in the reign of Edward I.

¹ *Plac. Abbr.*, pp. 145-6 (43 Hen. III).

² *Placita coram Rege*, Mich., 44-45 Hen. III, printed *Plac. Abbr.*, p. 151.

³ *Plac. Abbr.*, p. 260 b, Easter, 35 Ed. I.

⁴ *Placita coram Rege*, Mich., 33 Ed. I, *Plac. Abbr.*, p. 298 b.

⁵ Fleta, lib. ii. cap. 2.

CHAP. IV. some extent, concurrent with that of the King's Court in his Council in his Parliament. The Justices of that Court, 'as well Knights as Clerks,' were the King's *locum tenentes*. The King was always supposed to be in the place in which they were sitting, and they were supposed to sit only in the place in which the King was. They had criminal jurisdiction, and jurisdiction in false judgement and error, and their jurisdiction was exclusive, except in so far as it was shared by and subordinate to that of the King and Council, and that of any special commissioners appointed for special purposes.

The *Curia Regis*, Council, and King's Bench in the reign of Edward II.

At a still later date the *Curia Regis* makes its appearance in close connexion with the Council on the one hand, and with the King's Bench on the other. The Court of King's Bench had in the reign of Edward II a well-established jurisdiction in cases of error from the Court of Common Pleas. In cases of exceptional difficulty and importance, however, the Council was still called in, and not only the ordinary official Council¹ but the Barons and Magnates as well. Thus, when a fine of lands had been levied in the Court of Common Pleas and the family of the Despensers was interested, error was alleged, and the case was in the usual course brought into the King's Bench. It was not, however, settled by the ordinary Judges of the Court. Frequent deliberation was had with the Justices of both Benches, the Chancellor, the Treasurer, and the Barons of the Exchequer, as well before them all as before the Barons

¹ The expression, 'ordinary official council,' has been used here, and elsewhere, not in any technical sense, but to distinguish this more or less official or legal body from 'the whole Council.' The term *Concilium Ordinarium* is used by Sir Matthew Hale in a different and apparently more technical sense, but there appears no sufficient warrant for his two divisions, *Concilium Privatum* and *Concilium Ordinarium*, taken as legal definitions. His third division, the *Magnum Concilium*, had an existence in the reign of Edward II, as distinguished from the *Secretum Concilium*, which he does not mention. His fourth division, *Commune Concilium*, which, as he alleged, consisted of the two Houses of Parliament, was in existence before the House of Commons came into being. See Hale, *Jurisdiction of the Lords' House*, p. 5, et seq.

and other Magnates of the King's Council¹. Thereupon it appeared to the King's Court (*Curiae Regis*) that the fine ought to be annulled.

A remarkable illustration of the variety of Councils and of their connexion both with the Court of King's Bench and with the Chancery occurs in the sixteenth year of Edward II. The King, being at Bishopthorpe near York, caused to be summoned before him to his Council there the Archbishop of York, the Bishop of Norwich who was also Chancellor, the Bishop of Exeter who was also Treasurer, Edmund Earl of Kent the King's brother, the Earl of Pembroke, Hugh le Despenser Earl of Winchester, the Earl of Athol, Hugh le Despenser the younger, William de Ros of Hamelak, and several other Barons and Nobles (*Nobiles*) of his realm, together with the Justices of both Benches, the Barons of the Exchequer 'and others of his Council.' Among the Nobles (*Nobiles*) was Henry de Beaumont, a Baron, and one sworn of the Great and of the Secret Council of the King. When asked for his advice, Beaumont disrespectfully refused to give it. He was angrily commanded by the King to quit the Council; and, as he went, he said, in the same tone as before, that it would please him much better to be out of the Council than in it. The King then bade the Magnates and others of the Council to consider what judgement should be passed on him, inasmuch as being the King's liege, and a Baron, and sworn of the King's Secret Council, he had refused to give his advice and used opprobrious words. The Magnates and the rest of the Council, after careful deliberation, and after he had been called back into their presence and that of the King, passed judgement that he should be committed to prison for contempt and disobedience².

CHAP. IV.
The King's
Great
Council,
and Secret
Council :
remarkable
case of
Henry de
Beaumont.

The Court of King's Bench was at this time at York, The King's

¹ *Placita coram Rege*, Hil., 8 Ed. II, *Plac. Abbr.*, 320 a.

² *Rot. Lit. Claus.*, 16 Ed. II, m. 5 d (printed in *Parliamentary Writs*, vol. ii. div. 2. part 1. p. 285). *Placita coram Rege*, Trin., 16 Ed. II (printed in *Plac. Abbr.*, p. 342).

CHAP. IV. following the King ; and the rolls of the Court were used, as in so many earlier cases, for the purpose of recording the judicial proceedings of the Council. The Chancery also followed the King, as had recently been declared anew¹; and the rolls of the Chancery were used in like manner both in this and in other instances. The result in this instance is a double enrolment. The matter is of some little importance because no separate records of the proceedings of the Council of earlier date than the tenth year of the reign of Richard II are known to be in existence. The natural inference seems to be that the absolute separation of the Council from the original *Curia Regis*, or from the Court about the King, or from the Courts of Justice which followed the King, or from the Parliament, was not complete much before this time. There are many other facts which point to the same conclusion.

Bench and Chancery rolls used to record proceedings before the

Council : the Council not fully separated from other Courts before the reign of Richard II.

The several kinds of Councils enumerated.

It is clear from the records to which attention has been drawn that there were many kinds of Council known to the law. There was the Common Council of the Realm summoned, perhaps, only on great occasions ; there was the Great Council, which must have been a different and a more permanent body because a Baron could be sworn of that Council ; there was the Secret Council which must have been different, not only from the last-mentioned, but also from the official, legal, or ordinary Council, because we find a Baron, without office or technical qualification, belonging to it ; there was the 'Whole Council' which may or may not have been identical with the Great Council and which seems to have included necessarily the Chancellor, the Treasurer, the Justices of the two Benches, and the Barons of the Exchequer, if not others ; and there was the Council without any qualifying epithet, which may have been sometimes the last-mentioned body, sitting with a part only of its members, or sometimes any Council except the Common Council of the Realm.

Thus far the King's Court and Council have been traced

¹ 28 Ed. I, stat. 3. cap. 5.

in detail only in relation to the Court of King's Bench and the Court of Common Pleas. A very important attendant at the King's Court and member of his Council, however, was, during the earliest times after the Conquest, the Chancellor. He seems always to have had charge of the Great Seal. From the Chancery issued the Original Writs, duly sealed, for the trial of actions in the King's Courts of Justice. The Chancery, moreover, appears to have been, from the first, an office of the Common Council of the Realm, as afterwards it was an office of Parliament. Even the Original Writs did not issue on the authority of the Chancellor alone. Some writs were 'writs of course,' and could be had in the prescribed form upon application in the Chancery, but even these were originally allowed and approved by the Common Council of the Realm¹.

CHAP. IV.

The
Common
Council
of the
Realm, the
Chancery,
and
Original
Writs.

In the reign of Edward I, power was given to the clerks of the Chancery to issue writs '*in consimili casu*' where matters fell under the same law and required like remedy. If, however, the clerks could not agree upon the form, they were to refer the cases to the next Parliament so that a writ might be framed by men learned in the law². This provision, with its reference to the sages of the law, obviously has reference not to a Parliament in the modern sense of the term, but to one of those other bodies or councils to which the term 'Parliament' was commonly applied in the reign of Edward I, and for some time afterwards. It clearly was not the intention that writs should be considered and framed by the Lords Spiritual and Temporal, and the Commons in Parliament assembled, but by a body possessing special aptitude for the task. That body, there can be little doubt, was 'the King in his Council in his Parliament,' the resolutions of which, when promulgated, had the authority of the whole assembly. It would seem to follow that this later expression furnishes the interpretation of the phrase 'the Common Council of

The
'Parlia-
ment' and
the framing
of writs.

¹ Bract. 413 b.

² Stat. 13 Ed. I (Westm. 2), cap. 24.

CHAP. IV. the Realm.' The body which was to devise new writs in the reign of Edward I, must have been, allowing for differences of phrase and circumstances, the body which had framed the recognized 'writs of course' current in the reign of Henry III. Great attention had been given to the study of the law in the interval, and a class of men had arisen who were experts in the subject. To them naturally fell the actual task of settling the forms to be used, but their authority alone was not considered sufficient. They were summoned to the so-called Parliament, as members of the Council, but Archbishops, Bishops, Earls, and Barons were summoned also, and gave additional solemnity to the additions which were to be made in the Chancery Register of Original Writs.

Various
signifi-
cations in
which the
word 'Par-
liament'
was used.

About the reign of Edward I a new cause of confusion is introduced by the use of the word 'Parliament' in more senses than one, but a confusion through which it is, perhaps, possible to arrive at clearness. It is sometimes a Parliament, in the modern sense of the term, to which Lords Spiritual and Temporal and Commons are summoned. Sometimes it is a different kind of assembly. Thus in the twenty-third year of the reign the Archbishops and Bishops, and other Prelates, including forty-two Abbots and eleven Priors, were summoned, together with sixty-four Earls and Barons, to a 'Parliament' which was to meet on August 1. The Justices of both Benches, the Justices in Eyre, the Justices of Assize, the Deans sworn of the Council, and other Clerks of the Council were also summoned¹, but not the Commons.

According to the marginal description on the roll, a 'Parliament' was to meet at Salisbury, on February 27, in the twenty-fifth year, to which neither Prelates nor Burgesses were summoned, but only ninety-four Earls, Barons, and Knights². In the same year there were sum-

¹ *Rot. Lit. Claus.*, 23 Ed. I, m. 9 d (printed in *Parliamentary Writs*, ed. Palgrave, vol. i. pp. 28-9).

² *Rot. Lit. Claus.*, 25 Ed. I, m. 25 d (*Parl. Writs*, vol. i. p. 51 et seq.).

moned to attend the King's son, on September 30, five Bishops, two Earls, two Barons, two Archdeacons, eight Clerks of the Council, six Justices, and two Friars, and by other writs the Archbishop of Canterbury, six other Bishops, seventeen Abbots, four Priors (as well as in particular the Prior of St. John of Jerusalem), the Master of the Knights of the Temple, eight persons who were apparently Barons, and two more Earls. In the margin of the writ to the Archbishop of Canterbury this assembly also is called a Parliament¹. CHAP. IV.

The word Parliament, however, does not appear to have been used in relation to every kind of Council, and, in particular, not to the official or legal Council. Thus in the twenty-sixth year of the reign, when twenty-two persons only were summoned, the assembly was described as a Council in the margin of the roll. It consisted of the Bishops of London and Ely, nine other ecclesiastics, the Justices of the two Benchès, and the Barons of the Exchequer². The word applied to Councils, but not to every kind of Council

In the following year nearly all the same persons were called, as members of the Council, to attend a 'Parliament.' The Bishop of London was summoned, but simply in the capacity of Bishop. The Bishopric of Ely had fallen vacant. Of the rest seventeen were summoned as of the Council, with four others, among whom was John de L'Isle, a newly-appointed Baron of the Exchequer. Two out of these four had been mentioned in earlier writs as being of the Council. The distinction between this assembly and that of the twenty-sixth year lies in the fact that the Council was now summoned to meet at the same time as the Prelates and *Proceres*, among whom were two Archbishops, eighteen Bishops, thirty-five Abbots, four Priors, eleven Earls, and seventy-nine Barons. In the margin of the roll the meeting is described as Meaning of 'the King in his Council in his Parliament' precisely ascertained.

¹ *Rot. Lit. Claus.*, 25 Ed. I, m. 6 d. (printed *Parl. Writs*, vol. i. pp. 55-56).

² *Ib.*, 26 Ed. I, m. 12 d (printed *Parl. Writs*, vol. i. p. 65).

CHAP. IV. a Parliament, though the Commons were not in attendance¹. The appointed day was Sunday, March 8. On the twenty-fifth day of the same month the Mayor and Aldermen of London elected certain persons to further the business of the city 'before the King and Council in Parliament,' which had commenced its sittings on the previous ninth of March². The body before which the representatives of the city of London were to appear could only have been that which was to attend the King at London on March 8. It follows, therefore, that we know precisely what was meant by the expression 'the King in his Council in his Parliament,' which is of frequent occurrence in the records of important cases reported in the Year Books. This kind of Parliament was not necessarily a Parliament including the Commons, but a Parliament of Lords Spiritual and Temporal with the King and his Council sitting therein.

In this assembly (the King in his Council in his Parliament) it seems, too, that we must recognize the ancient Common Council of the Realm, modified, it may be, by time and circumstances, but still the nearest equivalent of that Common Council of the Realm which Bracton mentioned as the necessary authority for the form of an original writ. It was, as will presently appear, known by the name of 'full Parliament.' It was the fountain of justice, the source to which men commonly went if they felt aggrieved by the manner in which their causes were being heard in the Court of Common Pleas, or in the Court of King's Bench. It had not, even as late as the reign of Edward III, lost its hold over the Courts which had sprung from it, but controlled their proceedings, before judgement was pronounced or error alleged, and it gave its directions to those Courts on petitions made by the parties.

Control of
the King

It is sometimes possible, with the aid of the Year Books

¹ *Rot. Lit. Claus.*, 27 Ed. I, m. 18 d (printed *Parl. Writs*, vol. i. pp. 78-80).

² Lib. C. in *Archivis Civitatis Lond.* fol. 28 (extracted and printed in *Parl. Writs*, vol. i. p. 80).

(or early law reports), the records of the Courts of Common Pleas and King's Bench, and the rolls of Parliament, to follow out the whole mode of practice. There was in the reign of Edward III a family dispute which must have caused no little anxiety to the disputants. One Geoffrey de Staunton brought an action in the Court of Common Pleas against one John de Staunton and Amy his wife. In the course of the pleadings the question whether a certain averment was admissible or not was warmly disputed. Geoffrey presented a petition to the King in his Council in his Parliament praying, among other matters, a decision on the point. It was agreed in Parliament that the averment was admissible, and a writ was sent to the Justices of the Common Pleas instructing them to proceed. Nothing, however, was done; and a second writ was sent directing the Justices either to proceed, or to signify the reason why they did not. Upon this there was a new argument in the Court of Common Pleas. It was urged that the decision in Parliament, having been given in the absence of one of the parties, was unjust, and the Chief Justice of the Common Pleas declared it to be altogether bad law. An acting and a late Chief Justice of the King's Bench were consulted, and differed in opinion from each other. The result was that no judgement was given, and the Justices did not, as they had been directed, signify the cause.

CHAP. IV.

in his
Council in
his Parlia-
ment over
the pro-
ceedings of
the Court
of Common
Pleas ;
case in
illustration

Geoffrey then presented another petition to the Council praying that they would command the Justices of the Common Pleas either to give judgement or else to bring their rolls, record, and process, into Parliament, so that judgement might be given, one way or the other, before the end of term. It was thereupon 'agreed by all in full Parliament, and command was given by the Prelates, Earls, Barons, and others of the Parliament to Sir Thomas de Drayton, Clerk of the Parliament, that he should go to Sir John de Stonore, and his companions, Justices of the Common Bench,' and tell them to proceed to judgement before the rising of the Bench, without further adjourning or delaying the parties. In case they should be unable to

CHAP. IV. agree they were to come into Parliament, and the Chief Justice was to bring with him the rolls and the record of the plea into Parliament, there to take final agreement what judgement should be given.

Stonore and his companions did bring the record into Parliament, where were assembled the Chancellor, the Treasurer, the Justices of both Benches, the Barons of the Exchequer, and others of the King's Council. The process and record were viewed and read in Parliament, and it was there agreed at length that Geoffrey should recover against John and Amy. The decision was entered upon the Common Pleas roll thus:—'and there-upon advice having been had as well of the Prelates and Magnates, as of the Justices and others of the Council of the Lord the King being in the full Parliament last held,' judgement is given according to the direction of Parliament.

Control of
the King
in his
Council
in his
Parliament
over the
proceed-
ings of the
Court of
King's
Bench.

It might have been supposed that the matter was now at an end, but it was not. The Court of King's Bench had jurisdiction in error over the Court of Common Pleas. After all these delays, after the exertion of all the powers of the Council in Parliament, and after judgement had been given in accordance with the opinion of the highest legal and other authorities, there comes, in legal phrase, the lame and impotent conclusion that 'a writ of error was sued.'

The stages of the hearing in the King's Bench dragged on as slowly as those in the Court below, and were interrupted by similar petitions. John and Amy presented a petition to the King in his Council in his Parliament, representing that the Justices of the King's Bench had delayed proceeding to the correction of the errors assigned. This called forth a writ directing the Justices of the King's Bench to proceed after consultation with those of the Common Bench and others learned in the law. The cause, however, was again and again adjourned, and petitions were again presented to the King in his Council in his Parliament, both by Geoffrey on the one hand, and by John and

Amy on the other. In the end John and Amy abandoned the case, and did not appear when called in Court. Geoffrey then prayed execution of the original judgement, and had it ¹.

In the case of the Stauntons, though the matters in dispute were brought before the King in his Council in his Parliament, the petitions when presented remained 'in the Chancery ².' The plea is described as having come into the Chancery ³, and one of the King's writs directed to the Justices contains a clause in which it is expressed that the record and process had been brought 'before us in our Chancery ⁴.' It is to be observed too, that the petitions presented, during the progress of the case, to the King in his Council in his Parliament have a resemblance in form to the Petitions or Bills presented to the Council, and in later times addressed to the Chancellor, for the purpose of commencing a suit. They have the characteristic words 'pur Dieu' (for God's sake). The Chancery is the office of the King in his Council in his Parliament. The writs issuing from it issue in virtue of that higher authority. If the usual forms prove insufficient, justice has to be aided by the source from which it originally flows—the King in his Council in his Parliament—though the Chancery is used as the channel.

It is not necessary for the purposes of this history to trace the whole of the steps by which the functions of the Common Council of the Realm in relation to the Chancery were gradually delegated to the Council of another kind—to the official or legal Council of men learned in the law—or to show the growth of common law practice in the Chancery,

CHAP. IV.
The Chancery was the office of the King in his Council in his Parliament.

The Council in Chancery, and the King's High Court of Chancery.

¹ The facts in relation to the very illustrative case of the Stauntons have been put together from the following sources :—The *Year Book*, Mich., 13 Ed. III, No. 15 ; the *Placita de Banco*, Mich., 13 Ed. III, R^o. 107 d ; the *Rolls of Parliament* (printed 2 Rot. Parl. 122–125) ; and the *Placita coram Rege*, Hil., 15 Ed. III, R^o. 41. See also the introduction to the volume of *Year Books*, 13–14 Ed. III (edited by the present writer in the *Rolls Series*), pp. xxxvi–xliii.

² *Rolls of Parliament*, vol. ii. p. 123 a.

³ *Ib.*

⁴ *Ib.*, p. 125 b.

CHAP. IV. and the development out of it of the equity practice¹.

It is necessary, however, to bear in mind that the Chancery, like the Courts of King's Bench and Common Pleas, was the King's Court, and owed its existence to that greater King's Court or *Curia Regis* of which the Chancellor was a member. By degrees it became the custom for the King's Council—his legal or official council—to hear certain causes in the Chancery. Parties were required to appear 'before our Council in our Chancery,' and 'to do and accept as Our Court shall adjudge².' Here we see the Council in Chancery recognized as the King's Court or *Curia Regis*, and when petitions at a later date were addressed directly to the Chancellor and he decided causes on the principles of equity, it was in the King's High Court of Chancery.

The
Treasurer :
the Barons
of the
Exchequer
Peers of
Earls and
other
Barons.

Like the Chancellor, the Treasurer was a high officer commonly attendant on the King from the Conquest downwards, and so, in a certain sense, one of the King's Court. It has been disputed whether the Exchequer can be traced back, with a separate existence, as far as the Conquest. or was only a later outgrowth of the *Curia Regis*. The question is not of much importance in the present history, except in relation to the fact, that Barons of the Exchequer were Peers for the purpose of assessing the amercements of Earls and Barons, and that the Treasurer and Barons usually formed a part of the King's Council, and of his Council in his Parliament. It may, however, be worth noting that as soon as there was a Treasurer he must have had a department, with subordinates, just as the Chancellor had. There is consequently nothing unreasonable in the supposition that there was an Exchequer as well as a Treasurer in the time of the Conqueror, and it is quite possible that some matters relating to the revenue may even then have been brought before the Treasurer and some

¹ As to this, see an article by the present writer in the *Law Quarterly Review*, vol. i. p. 443. See also below, p. 296.

² This form appears on *Rot. Lit. Claus.*, 20 Ed. III, p. 2, m. 4 d, whence it has been cited in Palgrave's *Original Authority of the King's Council*, p. 132.

selected Barons, though the Chief Justiciary may have had the supreme jurisdiction in the absence of the King. CHAP. IV.

There was, no doubt, a tradition in the Exchequer, as early as the reign of Edward III, that its special laws, customs, and privileges grew up (*inoleverunt*) in the time of William the Conqueror, and were used and reduced to writing in the times of his successors. These privileges included the right of the officers of the Exchequer to plead in the Exchequer itself touching all wrongs and trespasses against themselves. In case error should be alleged, the Barons of the Exchequer themselves, having some of the King's lieges associated with them, were to consider and amend the error if necessary¹. This is a very elaborate organization for the time of the Conqueror, and it is to be observed that, when the Barons of the Exchequer living in the reign of Edward III specify particular kings in whose reigns these privileges existed, they mention none earlier than Henry III. It is most probable that, although the Exchequer, and even the Court of Exchequer, may have existed under William I, various changes were effected analogous to those which clearly distinguished the Court of Common Pleas from the Court of King's Bench, and that the various branches of the Exchequer, including the Exchequer of Pleas, did not all spring simultaneously ready-armed from the head of the Conqueror. It does, however, seem clear that, in the comparatively early stages of development, the Exchequer possessed some judicial functions, and was a King's Court. In the reign of Henry II² we find an account of a con-

The Court of Exchequer from William I to Edward III: Bishops and others, 'the King's Barons,' sitting in it.

¹ This appears in a certificate of the Barons of the Exchequer sent to the King and enrolled on the Lord Treasurer's Remembrancer's Remembrance Roll, Hil., 11 Ed. III, '*Adhuc recorda.*' The certificate is also enrolled on the King's Remembrancer's Roll of the same term. There is another copy of it in the *Rubeus Liber* of the Exchequer, but this, as it now stands, was not inserted before the reign of Henry VI, and is not, in all respects, perfectly accurate.

² *Reg. Roffen.* ff. 47-8, cited in Madox's *Hist. Exch.*, cap. iii. sec. 2, note. It has been doubted whether the Exchequer may not here be interpreted to mean the place of sitting rather than the Court. A simi-

CHAP. IV. cord or fine at Westminster at the Exchequer, as well as instances of Pleas at the Exchequer. We also find sitting at the Exchequer certain Bishops and others the 'King's Barons.' Some of the nobles about the King, those of his Court in the general sense of the term, were thus delegated to perform certain functions in the Exchequer; and so the Barons of the Exchequer were then and for some time afterwards the peers of Earls and Barons in general.

lar case, however, occurs '*coram Baronibus de Scaccario*' in the *Great Roll of the Exchequer*, 1 John, London and Middlesex.

CHAPTER V.

EARLDOMS AS OFFICES: GROWTH OF HEREDITARY EARLDOMS:

EARLDOMS BY TENURE, AND DUKEDOMS.

THUS far we have traced only the outlines of events down to the reign of Henry I, and the constitutional details affecting the Royal Court, the Councils, and the 'Parliaments,' down to the reign of Edward III. The status of the classes and individuals composing those assemblies has hardly been touched in the foregoing pages. It is a subject necessarily involving the consideration of some details which may, at first sight, appear to be of no great importance, but the statement of which is essential for the full comprehension of principles relating to the growth of the House of Lords.

The hereditary principle, which, in one sense, appears to have been firmly established in Normandy before the Conquest, could not, in the nature of things, be said to have become as firmly established in England immediately after it. When Englishmen were dispossessed by Frenchmen the latter held their newly acquired lands and titles of honour by purchase (to use a later legal phrase) and not by inheritance, and the terms in which the grants were made have in most instances not been handed down. An earldom seems to have been still regarded as an office, which might indeed descend by hereditary succession, but which did not so descend of necessity.

If we turn to Northumbria we find Copsi, or Copsig, apparently with the assent of the Conqueror, expelling

CHAP. V.

Necessity of details relating to the classes of which the King's Court, Councils, and Parliaments were composed.

An earldom an administrative office, not strictly hereditary, immediately after the Conquest.

CHAP. V. Osulf, the previous Earl, by force of arms, only to be himself defeated and put to death by Osulf. It is said that
 The Earldom of the Northumbrians. Robert Comyn or de Comines was the next nominee of the Conqueror¹; but, at any rate both he and Osulf were killed very soon after the death of Copsi. The earldom, it is said, was then bought of the Conqueror by Cospatric, a descendant of that Northumbrian house of which members had frequently held the earldom before the Conquest. He took, however, not by right of inheritance, but, in every sense of the term, by purchase, and, as the chronicler expresses it, 'administered the earldom' He fell away from his allegiance, and the earldom was then conferred by the Conqueror upon Waltheof, a son of Earl Siward by a daughter of Earl Aldred (both Northumbrian Earls before the Conquest). Waltheof, like many of his predecessors, met a violent death, and then the earldom was given to Bishop Walcher. He, in his turn, was killed, and Alberic, or Aubrey, whose name appears as a witness to a charter already cited, was set in his place. Aubrey, it is alleged, resigned, and was succeeded by Robert de Mowbray, from whom the earldom was taken by William Rufus, and retained in the hands of the Crown². During the Conqueror's reign the Earls appear to have been officially known as Earls not of Northumbria but of the Northumbrians. It would probably be difficult to prove that either Earl Aubrey or Robert de Mowbray did or did not leave heirs. but after Robert de Mowbray's time the earldom seems to have remained in the hands of the Crown, or to have been non-existent, during many years. Before Aubrey became Earl, however, the principles, if they deserve the name, on which the earldom devolved, in Northumbria, from one person to another, were practically indistinguishable from those which prevailed before the Conquest. They may be summed up as a regard for the claims of certain houses or families,

¹ Simeon of Durham (Rolls Series), vol. i. pp. 98-99, 245; A.S. Chron., *anno* 1068.

² Simeon of Durham, vol. ii. pp. 197-199, 382-384; Flor. Worc. vol. ii. pp. 251-252.

tempered by the military exigencies of the position, and a due consideration of the necessities of finance. CHAP. V.

The official character of the earldom which seems to be marked in the title Earl of the Northumbrians, rather than of Northumbria, is marked in a similar manner in the title of Alan Earl of the East Angles—not, be it observed, of Norfolk and Suffolk. This earldom also appears under the same name in the hands of Hugh Bigod during the reign of Stephen, though Hugh Bigod was subsequently created Earl of Norfolk by Henry II. The Earldom of the East Angles.

There is no known instance of the creation of an Earl by patent, or by any written instrument, before the year 1140, and consequently no distinct proof of limitation to the heirs of the grantee. The Earldom of Chester offers, perhaps, the nearest approach to a grant of this kind in the time of the Conqueror, because the terms of its grant to Hugh d'Avranches were, as alleged, to hold as freely by the sword as the King himself held England by the Crown. A County Palatine, however, was in a position different from that of other Earldoms, and the principles applicable to the one were not necessarily applicable to the others. It must, indeed, be accepted as certain that an earldom was not regarded as being absolutely hereditary in the early days succeeding the Conquest, because earldoms were commonly granted to ecclesiastics, as in the case of Odo Bishop of Bayeux and Earl of Kent, and in the case of Bishop Walcher, Earl of the Northumbrians¹. Earldoms granted to ecclesiastics.

At this time also it would seem that, so far as the King, the Earls, and the Barons were concerned, there was no difference of privilege or of status suggested between those who at a later period were designated Lords Spiritual and those who were designated Lords Temporal. The Church was one of the roads of promotion to secular offices—to the No difference, during the Conqueror's reign, between the status and privileges of

¹ The charter of William de Warenne to the Priory of Lewes, in which it is recited that William Rufus made him Earl of Surrey, does not prove an express limitation to his heirs, though his heirs did in fact have the third penny of the county of Surrey. The charter is printed in Dugd. *Monast.*, v. 12.

CHAP. V. highest secular offices in the land—to that of Chief Justiciary, to that of Chancellor, and to that of Earl. The Bishops certainly had it in their power to secure absolute equality with the Earls in all points, and might have secured the right of trial by Peers at a later period had they not thought fit to struggle for immunity from all secular jurisdiction. But the clergy had already entered on a conflict with the lay authority, in an attempt to secure exceptional privileges. It will, however, be most convenient to trace the course and issue of this policy in a later chapter, when the efforts of Becket and Stratford on behalf of their order are considered.

Lords
Spiritual
and those
of Lords
Temporal.

The first known grant of an earldom, with limitation to the grantee and his heirs, made in the reign of Stephen.

As the growth of hereditary earldoms cannot be distinctly traced before the reign of Stephen, it may be suspected that the exigencies of the war between him and the Empress Maud, daughter of Henry I, gave a stimulus to royal generosity. The first known documents which prove quite clearly that an earldom was conferred upon the grantee and his heirs are charters of King Stephen and the Empress Maud. Geoffrey de Mandeville had creations or grants from both to the effect that he and his heirs should be Earls of Essex¹. Maud also created Milo (or Miles) de Gloucester Earl of Hereford, giving him the castle of Hereford, and the 'third penny' of the pleas of the County Court in fee and inheritance².

The hereditary succession to an earldom at first qualified by the necessity that the heir should

From this time onwards the creation of Earls to hold to the grantees and their heirs is common. There is, however, apparent a very remarkable feature which still to some extent qualifies the hereditary succession. In the reign of Henry II Hugh Bigod was created Earl of Norfolk, receiving the third penny from Norwich and Norfolk. He and his heirs were to hold of the King and his heirs³. His

¹ The two charters have been printed by Mr. Round (the one from *Cott. Chart.*, vii. 4, the other from *Cott. Chart.*, xvi. 27, collated with the Dugdale and Ashmole MSS.) in *Geoffrey de Mandeville*, pp. 51 and 88.

² Rymer's *Foedera* (1816), i. 14, from the Cotton Collections.

³ *Cartae Antiquae*, S. n. 13, printed in *Reports on the Dignity of a Peer*, vol. v. p. 2.

son Roger Bigod was nevertheless created Earl of Norfolk by Richard I, just as if he had no right of inheritance¹. It is, indeed, possible that Hugh may in this case have been considered to have forfeited his earldom for traitorous practices, and that Roger may have been restored by a new grant. But there are other examples which show that the son did not at any rate become a full Earl upon the death of his father.

CHAP. V.

be girt
with a
sword by
the King:
instances.

Geoffrey Fitz-Piers or Fitz-Peter, Earl of Essex, died, it is said, in the year 1213. He had been girt with the sword of the earldom, at the Coronation of King John², and he appears as a witness to several charters by the designation of Earl of Essex. He had married a grand-daughter of the heiress of William de Mandeville, Earl of Essex, but it is not clear that he was supposed to have a title to an hereditary earldom. His eldest son, Geoffrey, was eventually recognized as Earl of Essex, but not immediately after his death. The fact is curiously shown by the record of a cause of Michaelmas term in the fifteenth year of John's reign (A. D. 1214). Geoffrey de Say demanded the manor of Pleshey, together with the honour which had belonged to William de Mandeville, Earl of Essex. Geoffrey de Mandeville (the son of Geoffrey Fitz-Piers) pleaded that much was wanting to him of the honour which had belonged to Earl William, that William was Earl of Essex and girt with the sword of an Earl, and in receipt of the third penny, whereas Geoffrey de Mandeville was neither an Earl, nor girt with the sword, nor in receipt of the third penny³.

At the beginning of the reign of Henry III also it seems that the son and heir of a deceased Earl did not immediately become Earl, and that he was not even in full possession of his earldom after having had livery of his lands. Thomas, son and heir of Henry Earl of Warwick, appears to have had livery of his lands in the thirteenth year of the

¹ The second grant is printed in the *Reports on the Dignity of a Peer*, vol. v. p. 4, from *Cart. Antiq.*, 1 Ric. I, S. n. 14.

² Hoveden (Rolls Series), vol. iv. p. 90.

³ Printed in the *Plac. Abbr.*, p. 93.

CHAP. V. reign, but it was not until the seventeenth year (four years afterwards) that the following precept was sent to the sheriff of the county of Warwick: 'The King hath girded Thomas de Warwick with the girdle of the Earldom of Warwick, and the sheriff of Warwick is commanded that he cause the same Earl to have of the County aforesaid that which he ought to have in the name of Earl of Warwick and whereof his predecessors, Earls of Warwick, were seised as belonging to them in the name of the Earldom of Warwick¹.'

It might have been supposed *a priori* that when it was necessary for an Earl to be girt with the sword by the sovereign, the girding of the ancestor could not enure (or operate) to the benefit of the heir. When the heir of any tenant *in capite* had to sue out livery of the land held by his ancestor, it could hardly be possible that the heir of an Earl could gain possession of his Earldom without the ceremony of girding with the sword. The instances above cited are probably sufficient to prove the point, and the point when proved goes far to qualify the principle of absolutely hereditary succession. The succession was hereditary, but subject to the approval of the sovereign as expressed by the ceremony of investiture with the sword and belt.

Another principle distinguishable in the reign of Henry III: earldoms associated with an estate of inheritance in lands: the earldom of Lincoln.

There was, however, another principle coming into operation in the reign of Henry III, and one closely associated with the doctrine of barony by tenure. Every Earl, as forming part of the baronage, was a baron also. A man who succeeded to an estate of inheritance in a barony appears to have been subject to the burdens and to have had a right to the privileges of his predecessor. The theory that an Earl had a purely official or administrative rank was now on the wane, though not yet extinct. The theory that the rank followed an estate of inheritance in the lands seems now to have been entertained, though not yet fully estab-

¹ Cited in Dugdale's *Antiquities of Warwickshire*, p. 270, from *Anon. Evesh.* MS. (in the Bodleian Library), fo. 50 a.

lished. Thus Ranulf Earl of Chester and Lincoln, executed a deed conveying to his sister, Hawise de Quency, the county (*comitatum*) of Lincoln (so far as it belonged to him), to hold to her and her heirs, of the King and his heirs, with all its appurtenances and with all the franchises thereto belonging, in order that she might be Countess thereof (*inde Comitissa*)¹. The 'county, so far as it belonged to' Ranulf, can in this instrument hardly mean anything but those possessions in the county which had been held by the Earls of Lincoln. The word *comitatus* has sometimes been otherwise translated—sometimes as the earldom in the sense of the dignity², and sometimes as the third penny attaching to the earldom³. It is, however, impossible that the word could have been used in either of those two senses. Ranulf wished his sister to be Countess of Lincoln, not Countess of the earldom, which would be a phrase without meaning. He wished her to have not barely the third of the proceeds of the County Court, but an estate of inheritance also in the lands with which the earldom of Lincoln was associated; and although *comitatus* is a word used to express the County Court as well as the county, it would not be used to express a third part of the proceeds alone.

Hawise de Quency, it appears, wished her son-in-law, John de Lacy, to be recognized as Earl of Lincoln in her lifetime, and King Henry III, at her instance, granted to him the third penny of the County Court of Lincoln, as previously received by Ranulf Earl of Chester and Lincoln. It is mentioned in the grant that Ranulf had in his lifetime given this third penny to his sister. The royal grant, however, differs from the terms of the deed made by Ranulf. According to the latter the *comitatus* or county was conveyed to Hawise in fee simple. Henry's grant settled the

¹ The deed is printed in Selden's *Titles of Honour*, p. 653.

² E.g. in *Cruise on Dignities* (2nd edition), pp. 109-111.

³ E.g. in the *Third Report on the Dignity of a Peer*, vol. ii. p. 238.

CHAP. V. third penny in special tail to John de Lacy and his heirs by Margaret his wife, daughter of Hawise¹.

It is sufficiently clear from these transactions that the word county or *comitatus* in a conveyance was held not to be, but to include the third penny received by the Earl from the proceeds of the County Court. It seems clear also that the third penny could not be treated as a charge on the issues of the County Court which might be conveyed away at his pleasure by a person having the fee simple. A licence to alienate was of course necessary, and the Crown could therefore interfere to prevent any alienation which had not the royal approval, and would certainly regard with a very jealous eye any alienation which affected a part of the royal revenue.

Partition
between
coheirs :
effect of
one county
or earldom
alone
falling to
coheirs :
the Earldom
of
Chester.

If an Earl held a county, together with lands in other counties, and died without male heir, partition could be made between his female coheirs, and one of them could receive the 'county' as her share, though many cases show that, for some centuries after the Conquest, the death of an Earl who was Earl of one county only, and left only female coheirs, was a cause of perplexity. In the twenty-third year of the reign of Henry III it was decided that 'if the *Earldom* of Chester descend to coparceners, it shall be divided between them just as other lands, and the eldest shall not have that seignory (or lordship) entirely to herself².' The confusion, in this passage, between the earldom and the lands of the earldom is a sufficient indication that there was some connexion between the two. There is no evidence that the first Earls of Chester after the Conquest, though invested with the sword, held a dignity apart from the lands. They must, indeed, having Palatine rights, have been in the same position with regard to the lands of the county, as the King with regard to the lands of England generally, and have been chief lords over them all.

¹ *Rot. Lit. Pat.*, 17 Hen. III, m. 9, No. 35 (printed in *Reports on the Dignity of a Peer*, vol. v. p. 8).

² Fitzherbert's Abridgement, *Particion*, 18 (23 Hen. III), and see Co. Litt. 165.

When the lands were held to be partible (A.D. 1239), the point must have arisen in view of the recent decease of John the Scot, Earl of Chester, without heir male. He had himself succeeded¹ to the earldom in right of his mother, one of the coheirs of Ranulf, Earl of Chester. Partition of lands had been made between Ranulf's sisters and coheirs, or their representatives, and the whole County of Chester had been allotted to the eldest sister Matilda, John's mother, the other sisters receiving lands of proportionate value². When John died, however, it was no longer possible to make partition between his sisters, or their representatives, in such a way as to give the County of Chester to one, because the other possessions of Ranulf had already been allotted. According to strict law, therefore, the county would have had to be divided, or otherwise to be held in coparcenary. The difficulty, however, was evaded by giving other lands as compensation to the coheirs, and by retaining those of the earldom in the hands of the King³.

In the reign of Richard II, it is clear, the legal mind was familiar with the idea that the earldom was to be identified with the County or *Comitatus*, and that the County or *Comitatus* was equivalent to the possessions attaching (and, as it would appear, inseparably attaching) to the earldom. The same idea was then also attributed to lawyers as far back as the time of Henry III.

Richard wished to establish his right to nominate a person to receive a pension or annuity from the Priory of Coventry. The Prior disputed the claim on the ground that the Priory (or, as it had once been called, the Abbey) was not of royal foundation. According to the plea on his

The title to the County of Chester, in the sense of the lands and possessions of the earldom, regarded as identical with the title to the earldom itself from Henry III to Richard II.

¹ *Successit* is the word used both in Wendover (Rolls Series), vol. iii. p. 40, and in Knighton (Rolls Series), vol. i. p. 211, though it is sometimes said that John was created Earl.

² *Rot. Lit. Pat.*, 22 Hen. III, m. 4, and m. 11, and 25 Hen. III, m. 1, and *Rot. Lit. Claus.*, 22 Hen. III, m. 12 (cited in Dugdale's Baronage, vol. i. p. 46), and Knighton (Rolls Series), vol. i. p. 212.

³ *Rot. Lit. Pat.*, 31 Hen. III, m. 6 (cited in the *Third Report on the Dignity of a Peer*, vol. ii. p. 130).

CHAP V. behalf, the House had been founded before the Conquest, and the *advocatio*, advowson, or patronage had always been with the Earls of Chester. It is not necessary to accept as accurate the pedigree by which the inheritance is traced from Leofric, who was Earl of Chester before the Conquest, through Hugh d'Avranches, as a son of Leofric's sister, to Ranulf, the last of that name who was Earl of Chester and Lincoln, and from Ranulf to his four sisters. The pedigree differs in many particulars from the facts as stated in contemporary documents. The principle enunciated, however, was very clear, and was not disputed. On Ranulf's death it is said, the advowson or patronage of the Priory, together with the whole county (*Comitatus*) of Chester and its appurtenances, was allotted to Matilda, one of Ranulf's sisters, in satisfaction of her share, while various other castles, manors, lands, and tenements were allotted to the other sisters. The advowson or patronage, it is said, 'together with the whole County of Chester,' descended from Matilda to her son John the Scot. Earl of Chester. It is also said that John afterwards gave the advowson, together with the whole County of Chester, to King Henry III, and the devolution (always including the whole County of Chester) is then traced through successive Kings to Richard II¹. It thus appears indisputable that from the time of Henry III to that of Richard II the title to the county (or possessions of the earldom) of Chester was regarded as identical with the title to the earldom itself.

The Earldom of Pembroke held to be the right of one who succeeded to a part of the inheritance, as descen-

A different course was taken in relation to the Earldom of Pembroke (like that of Chester, a Palatine earldom) in the reign of Edward III, but here also it is evident that the descent of the earldom was associated, according to the prevalent ideas, with the inheritance of the lands. The inheritance of Aymer de Valence, Palatine Earl of Pembroke, devolved upon his sisters, to be divided between them and their heirs in due proportion. Nothing appears

¹ *Placita coram Rege*, Hilary, 14 Richard II, *Rex*, R^o. 20.

to have been done with regard to the earldom immediately, but Lawrence de Hastings, who *succeeded to part of the inheritance*, as descendant of the eldest sister, was held by the lawyers to be entitled to the 'prerogative of the name and honour.' The name of Earl of Pembroke was therefore confirmed to him by the King 'willing and granting that Lawrence do have and hold the prerogative and honour of Earl Palatine *in the lands which he holds of the inheritance of the said Aymer*, as fully and in the same manner as Aymer had and held them at the time of his decease¹.' It was clearly in virtue of his part of the inheritance that his claim to the earldom was recognized.

CHAP. V.

dant of an
eldest
sister.

It is probable that as early as the reign of Edward I the ceremony of girding a newly-created Earl with a sword enured to his heirs without the absolute necessity of a new ceremony on succession. It is probable also that the idea of an earldom by tenure, or associated with the holding of certain lands, was not unfamiliar at this period, and had grown up since the Conquest. In this reign an Earl was summoned to Parliament in a manner which can hardly be reconciled with any other hypothesis than that of holding the earldom by tenure of the lands.

Earldoms
by tenure
in the
reign of
Edward I.

Gilbert de Clare, Earl of Gloucester and Hertford, married, as his second wife, Joan, a daughter of King

The
Earldoms
of

¹ There are some curious mistakes with regard to the authority for this matter in the *Third Report on the Dignity of a Peer* (vol. ii. pp. 180-181). It is there said that the Letters Patent are cited in 'the third Institute' but that they had not been found on the Roll. They are in fact cited in 4 Inst. 221, and they do appear on the Roll of Letters Patent, 13 Ed. III, Part 4, m. 12. Coke's reference is perfectly correct with the exception that he omitted to insert the words 'Part 4'; but the omission would cause little difficulty to any one who is familiar with records. It is suggested in the same passage, in the *Third Report on the Dignity of a Peer*, 'that there was a difference between the term 'Earl of Pembroke,' and the term 'Earl Palatine,' and that the dignity of Earl was something different from the prerogative and honour of Earl Palatine; but the words 'prerogative and honour' are used in relation to the Earl of Pembroke, and there does not seem to be any ground for this very subtle distinction.

CHAP. V.

Gloucester
and Hert-
ford settled
by a settle-
ment of
the lands.

Edward I. Upon that occasion he surrendered his lands to the King, and new settlements were made, the terms of which are fully set out in the Charter Roll of the time¹. The lands in Ireland were settled in one form, those in England and Wales (with which alone we are now concerned) in another. All the castles, manors, and lands in England and Wales, with all their appurtenances, were granted and confirmed by the King to the Earl and his wife, and the heirs of their bodies, to be holden by the same services as before the surrender, as freely, fully, and honourably (*honorifice*) in all rights, royalties, honours, lordships, free customs, and all other things appertaining to the castles, manors, and lands as the Earl held them on the day of the surrender, without any reservation. If the Earl should die without heir of their two bodies, or if the heirs of their bodies should die without heirs of their bodies, and Joan should survive, she was to have and to hold, at her will for ever all the castles, manors, and lands, with all their appurtenances, rights, royalties, liberties, and all other things appertaining thereto as her own inheritance. If, however, there should be heirs of their two bodies, Joan was to have no power to make any alienation of the lands, and if she should die without heirs of their two bodies, and the Earl should survive, all the castles and lands were to 'remain and wholly revert' to him and his heirs as if the surrender and settlement had not been made.

Case of
Joan,
widow of
Gilbert,
Earl of
Gloucester
and Hert-
ford, tenant
in special
tail of the

The Earl died, leaving (with other issue) a son, Gilbert, by his wife Joan. She was then, according to the terms of the settlement, tenant in special tail of the castles, lands, and everything granted according to the King's charter. During her widowhood she was attracted by the manly and graceful appearance of one Ralph de Monthermer, who, at that time, was not a peer, or even a knight². She married

¹ Charter Roll (Chancery), 18 Ed. I, nos. 59 and 60. These are cited, but not by any means correctly, in Dugdale's Baronage, which has served as the basis of statements in many subsequent Peerages.

² Trokelowe, *Annales* (Rolls Series), p. 27.

him without asking her father's consent. Apart from any question of want of filial respect, this was a serious offence from a feudal point of view, as Joan was what was termed a King's widow—the widow of one holding *in capite*, who could not, except at her own risk, marry without the King's licence. The lands were consequently seized into the King's hands. The King, however, was afterwards appeased, and the lands were restored.

CHAP. V.
lands,
married to
Mont-
hermer, a
commoner.

According to the law of the period, though Joan was now tenant in special tail, it was only in subordination to her husband, who held the lands in her right, without whom she could not sue or be sued, and who was bound to perform the services by which the lands were held. Ralph de Monthermer, however, was not only summoned to perform military service, but was summoned as Earl of Gloucester and Hertford¹. He was also summoned as Earl of Gloucester and Hertford to give his advice in Parliament².

It is usually said that Monthermer was summoned as Earl in right of his wife, but before that proposition can even be entertained it must be clearly proved that the wife herself had an earldom. If she had it, she could certainly have had it only as an appurtenance or part of the castles, lands, and rights previously the inheritance of her first husband, her estate in which was acquired by the King's charter effecting the new settlement. In that charter there is no express mention of any earldom, and, if any passed by the terms of the grant, it could have passed only in one of two ways—either as included in some of the other terms used, or as included under the word appurtenances. These two ways, however, resolve themselves into one only, for it matters little whether an earldom could pass under words relating to lands by various designations or under the word appurtenances. As there was

¹ *Rot. Lit. Claus.*, 27 Ed. I, m. 9 d (printed in *Reports on the Dignity of a Peer*, vol. iii. p. 112.

² *Rot. Lit. Claus.*, 28 Ed. I, m. 17 d; and subsequent years (printed, p. 113, &c.).

CHAP. V. no express mention, if any earldom passed at all, it passed with the lands and castles.

Gilbert, the heir, did not, on his father's death, succeed to the earldom.

Another consideration also suggests itself here. Gilbert, son of Gilbert de Clare and Joan, was the heir to the earldoms, and must have succeeded on his father's death, if the earldoms were strictly hereditary, and not capable of being made the subject of a new settlement. What, then, happened after the settlement was made upon the marriage of his father and mother? What was his position, with regard to the earldoms, when his father died? When Ralph de Monthermer was recognized as Earl, were there two Earls of Gloucester, or only one? Clearly, if there was only one, the succession to the earldom was interrupted by the settlement of the lands; and it is absurd to suppose that Gilbert and Ralph were both Earls of Gloucester at the same time.

Indications that the earldoms were earldoms by tenure.

The difficulties, however, vanish at once on the theory that the earldoms of Gloucester and Hertford were earldoms by tenure. On that supposition, but on no other, Ralph de Monthermer was in the same position with regard to the earldoms as with regard to the lands. As long as his wife lived, he had, by law, the same rights and the same liabilities (including that of summons to Parliament) in respect of the lands as the wife would have had if a male. If a male holder of the land in fee tail, or otherwise having an estate of inheritance, would have been an Earl, then her husband was of necessity an Earl also; but she could not, apart from the lands, give him any dignity as an Earl, because her legal status would have been only Joan, wife of Ralph de Monthermer. Contemporary records, however, show that her status actually was Joan, wife of Ralph, Earl of Gloucester and Hertford¹—not, be it observed, Joan, Countess of Gloucester and Hertford, wife of Ralph de Monthermer, for such a designation was, at that time, unknown to the law.

¹ In Michaelmas Term, 28-29 Ed. I, Ralph de Monthermer and Joan his wife were defendants. The case is printed in the *Plac. Abbr.*, p. 242. They are mentioned, under the same description, on p. 255.

There are several cases, in the reports of the period, which prove the same point, and show incidentally that the Earl suing with Joan, as wife, claimed the rights of the preceding Earl and his ancestors¹. Of course the husband was liable for the military services due in respect of the lands which he held in right of his wife, and everything in relation to Monthermer's position is perfectly intelligible, and quite usual except the application to him of the title of Earl of Gloucester and Hertford. CHAP. V.

It is not known that Ralph de Monthermer was created Earl by patent, or girt with the sword of earldom by the King, nor is it in the least degree probable that he ever was. He had no estate of inheritance in the earldoms, as they went to Gilbert, heir of Gilbert de Clare. He had not even the earldoms for life, as they departed from him as soon as his wife died. As long only as his wife lived, her estate of inheritance in the lands was for all practical purposes his, and for that reason, to all appearance, he enjoyed the earldoms.

When Joan died, the lands, under the settlement, immediately became the right of young Gilbert de Clare, son of her and her first husband, and heir in special tail. He was a minor, and the wardship of his lands belonged to the King. Ralph de Monthermer, being no longer in possession of the lands, and having in his own person no claim to an estate of inheritance, ceased to be Earl²; and this fact in itself affords a very strong presumption that the earldoms followed an estate of inheritance in the lands. Edward II

Gilbert, heir in special tail of the lands, is recognized as Earl only after his mother's death.

¹ E.g. *Year Book*, E, 32 Ed. I, pp. 177-9, and T, 32 Ed. I, pp. 209-213.

² Some very curious mistakes in relation to this point appear in the *First Report on the Dignity of a Peer*, p. 432, where it is said that Ralph de Monthermer was summoned as Earl of Gloucester during the minority of his 'son-in-law,' 'the son-in-law, after he attained his age, being summoned as Earl of Gloucester.' Gilbert, the heir, was not son-in-law, but step-son, of Monthermer. The fact of his being step-son has no direct relation to the subject, and, as will be seen, his summons to Parliament preceded his attainment of full age.

CHAP. V. who had just succeeded to the throne showed great favour to his nephew. Gilbert's lands were restored, while he was yet a minor, in order that he might be knighted¹. He was summoned as Earl of Gloucester and Hertford, in January 1307-8, when he was not yet seventeen years of age. to be present at his uncle's coronation². He was summoned to Parliament as Earl of Gloucester and Hertford, one day later³, and he was summoned, as Earl of Gloucester, to perform military service against the Scots, on June 21, 1308, when he had just completed his seventeenth year⁴.

Monthermer then ceased to be summoned as Earl, and was subsequently summoned as a newly-created Baron.

Hugh de Courtenay; the Earldom of Devon declared to follow an estate of

If further proof were needed that the earldoms followed the estate of inheritance in the lands it would be shown in the fact that after Joan's death Monthermer ceased for a short time to be summoned to Parliament at all. In March 1309, however, he was again summoned, no longer as an Earl, but among the Barons⁵. According to modern ideas this summons followed by a sitting in Parliament, was Monthermer's creation as a Baron.

Another instance of earldom by tenure, an instance in which an earldom followed an estate of inheritance in certain lands, may be discerned in the early Earldom of Devon. William de Fortz (or Fortibus), Comte d'Aumarle⁶ married as his second wife Isabella daughter of

¹ *Rot. Lit. Claus.*, I Ed. II, m. 15.

² *Ib.*, I Ed. II, m. 12 d.

⁴ *Ib.*, I Ed. II, m. 2 d.

³ *Ib.*, I Ed. II, m. 11 d.

⁵ *Ib.*, 2 Ed. II, m. 11 d.

⁶ He was *Comes Albae Marliae*, of which the French translation is, no doubt, Comte d'Aumarle or Aumâle. Whether the expression can rightly be translated Earl of Albemarle, may, perhaps, be open to doubt, as the title was of French origin, and the place from which it was taken in Normandy. The succession to that title is, in itself, a subject of much interest, but, in the absence of proof that it relates to an English earldom, it would hardly be relevant to enlarge upon the subject. In more instances than one, the husband of an Albemarle heiress became *Comes Albae Marliae*. Thus after Hawise, daughter of William le Gros, *Comes Albae Marliae*, married William de Mandeville, he was '*factus Comes Albae Marliae*' (*Chronicle of Robert de Torigny*, Rolls Series, p. 282). Her third husband, Baldwin de Bethune, was *Comes Albemarliae, dono Ricardi Regis* (Hoveden, Rolls

Baldwin de Ripariis, Redvers, or Rivers, Earl of Devon. CHAP. V.
 On the death of her brother who had succeeded to the earldom, she inherited his lands, and with them apparently the earldom. This happened after her husband's death, and she was then described sometimes as Countess of Albemarle, sometimes as Countess of Devon, and sometimes as Countess of Albemarle and Devon. In the fifty-second year of Henry III she brought, as Countess of Albemarle and Devon, an assise of Mort d'Ancestor against the Prior of Brommore, as Countess of Albemarle an action against one Adam de Newmarch and others, and as Countess of Devon against one Roger de Lancashire and others¹. It is probable that there was in each case a reason for the particular description, and one connected with the tenure of lands, for in the following reign, when the King asserted his right of presentation to a church, as having in his hands by escheat the lands of the Earl or Count of Albemarle, it was disputed whether the lands to which the advowson appertained belonged in fact to the Earl of Albemarle or to the Earl of Devon².

inheritance
in the lands
in the
reign of
Edward III.

Her children died during her lifetime without issue, and her next heir was Hugh de Courtenay, a descendant of Mary, daughter of William de Redvers (or Vernon), Earl of Devon, who died in the year 1216. The fact that he was heir does not appear to have been at any time disputed, but when he claimed certain lands held by Isabella de Fortz, and in particular the whole of the Isle of Wight, his claim was contested on the ground that she had conveyed these particular lands to the King for the sum of six thousand marks. The proceedings appear in the rolls of Parliament of the eighth year of the reign of Edward II, when the matter was held over for further consideration³.

Series, iii. 306). In both cases the title seems to have been given by the Crown. Hawise's second husband, William de Fortz, was also *Comes Albae Marliae*, as was their son after her death.

¹ Mich., 52 Hen. III, printed in *Plac. Abbr.*, pp. 172-3.

² *Placita coram Rege*, Easter, 24 Ed. I, R^o. 2. *Plac. Abbr.*, p. 262.

³ *Rot. Parl.*, 8 & 9 Ed. II, No. 1 (printed, vol. i. pp. 334-6).

CHAP. V. It was probably by reason of doubts and disputes relating to portions of the inheritance that Hugh de Courtenay was not for some time recognized as Earl of Devon, though he was summoned to Parliament among the Barons as early as February 6, 1298-9 (27 Ed. I) and for many years afterwards. Though not called Earl, however, he received the third penny (or third part of the proceeds of the County Court) of Devonshire, in the same way as the Countess and previous Earls had received it. An objection was at length made that a person who was not an Earl ought not to receive this third penny. The payment ceased and the claim was disallowed.

Courtenay, however, in the reign of Edward III had had his right recognized if not to the whole of the lands which Isabella had held, at any rate to so much of them as constituted the inheritance of the Earls of Devon. He then presented a petition to the King in relation to this matter of the third penny, and the King caused enquiry to be made at the Exchequer. The Treasurer and Barons of the Exchequer certified that the money had been withheld because Courtenay had not used the name and title of Earl. The King thereupon sent a writ or 'letter close' to Courtenay, reciting the facts, and commanding him to take the name and honour of an Earl, for certain reasons, which deserve attention. 'Because the *inheritance* of the Countess and of her and your predecessors, Earls of Devon, has descended to you by right of inheritance, and you at this present do hold the inheritance we will and command you that you cause yourself henceforward to be called Earl of Devon.' The King promised that the third penny should in future be paid to him as it had been paid to the Earls of Devon his predecessors¹. The King also directed a writ to the Sheriff of Devonshire to make proclamation that Courtenay was to be esteemed and called Earl of Devon, and directed

¹ *Rot. Lit. Claus.*, 9 Ed. III, m. 35 d. It is erroneously stated in the *Reports on the Dignity of a Peer*, vol. ii. p. 176, that the declaration was by Letters Patent. This is a very serious mistake, as Letters Patent might imply a new creation.

the Treasurer and Barons of the Exchequer to cause the third penny to be paid to him, by the name of Earl, in the same manner as to his ancestors. CHAP. V.

It is difficult to interpret the reasons given by the King in any other sense than that the earldom followed or ought to follow the rest of the inheritance. Courtenay was to take the title of Earl of Devon, not because that dignity itself and by itself had descended to him, but because the inheritance of the Earls of Devon had so descended and was already held by him. There was no new creation, no investiture or girding with a sword, but a simple direction to assume the name in virtue of the inheritance already held.

From one point of view this may be regarded as a recognition of an earldom by tenure, but not as a recognition of the proposition that the earldom absolutely followed the lands. The descent to the Earl by right of inheritance is an essential feature of the reasons given, and it does not follow that a purchaser of everything included in the inheritance of the Earls of Devon would acquire the earldom by the purchase. It does, however, seem to follow that a conveyance of the lands to a stranger in fee would deprive an heir of his succession to the earldom.

The conveyance of the lands to a stranger might perhaps deprive the heir of the earldom without conferring it upon the stranger.

While some earlier earldoms had thus come to be associated with the tenure of certain lands, some later earldoms were associated with the grant of lands to support them. Thus when William de Bohun was created Earl of Northampton in the year 1337, he had not only a fixed charge of twenty pounds *per annum* on the issues of the county¹, but also a grant to him and the heirs male of his body of various castles and manors². In the same year several other Earls were created, and at the same time commonly received lands to the value of a thousand marks *per annum*, as well as a certain sum from the revenues of

It was a recognized doctrine in the reign of Edward III that an Earl must have lands to support his earldom.

¹ *Rot. Chart.*, 11 Ed. III, no. 49 (printed in *Report on the Dignity of a Peer*, vol. v. p. 30).

² *Originalia Roll*, Exchequer, 11 Ed. III, R^o. 50 (cited in Madox's *Baronia*, p. 149).

CHAP. V. the county. William de Clinton was made Earl of Huntingdon on those terms¹, Robert de Ufford Earl of Suffolk², and William de Montague Earl of Salisbury³. In each case certain specified lands were assigned in whole or part satisfaction of the claim thus given to a thousand marks *per annum*. In each case the lands were given to the newly-created Earl and the heirs male of his body, with reversion to the Crown, though, whether from inadvertence or otherwise, the rent charged upon the county was to be held by the Earl and his heirs, of the King and his heirs, for ever.

All these Earls were created and belted in 'Parliament,' but not all in the same kind of Parliament. The Earl of Huntingdon, the Earl of Northampton, and the Earl of Suffolk were so made by the common consent and advice of the Prelates, Earls, Barons, and others of the Council in Parliament. The Earl of Salisbury was so made at the request of the Prelates, Proceres. and Commonalty of the realm in Parliament. In each of these instances, however, it was clearly recognized on all hands that an Earl must have lands to support his earldom.

The first Duke (of Cornwall) girt with a sword; like an Earl; lands inseparably attached to the dukedom.

The subject receives further illustration from the terms in which the first Duke was created. He was Edward the Black Prince, son and heir of Edward III. His charter was constructed on lines similar to those of the Earls newly made in the same year. His dukedom was in fact only a superior kind of earldom. It was conferred, like most of the earldoms of the period with the common consent and advice of the Prelates, Earls, Barons, and others of the King's Council in Parliament, and without any reference to the Commons. He was girt with a sword in the same manner as the Earls. He had the shrievalty of Cornwall

¹ *Rot. Chart.*, 11 Ed. III, nos. 34, 41, and 42 (printed in *Rep. Dig. Peer*, vol. v. pp. 27-30).

² *Ib.*, 11 Ed. III, nos. 51 and 52 (printed in *Rep. Dig. Peer*, vol. v. pp. 31 and 38), and *Rot. Lit. Pat.*, 11 Ed. III, part i. m. 5 (printed, p. 33).

³ *Ib.*, 11 Ed. III, nos. 54 and 55 (printed, pp. 32 and 34).

granted to him in such a manner that he could constitute a Sheriff of Cornwall at his pleasure. In this respect he had the functions of an Earl of the olden time, his nominee being the Vice-Earl, as the Sheriff always should have been according to the etymology of his Latin and French designations¹. Vast possessions were also assigned to him, but only as Duke of Cornwall²; and they were annexed and united to the dukedom for ever, and made inseparable from it³. The grant of them was only to the Black Prince and the first-born sons of him and his heirs, being Kings of England, and to Dukes of Cornwall by succession of inheritance. Thus there could be no Duke of Cornwall without the lands assigned to the dukedom, and the lands assigned to the dukedom must always be in the hands of the Duke when not in the hands of the Sovereign⁴.

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The grants of lands by the King, though probably not usually made without due consideration, occasionally gave rise to disputes in matters of detail. Sometimes, it was said, the King was 'deceived in his grants.' For this reason it was enacted in the year 1399 that he should always have the advice of the sages of his Council with regard to matters touching his estate and that of the Realm. All persons asking for lands, rents, offices, or other profits from the King were also to make, in their petitions, express mention of the value not only of those lands or profits, but also of any others which they might have had by gift from the King or any of his predecessors.

Acts of
Parliament
to restrict
the grant
of Crown
Lands in
the reign of
Henry IV.

¹ *Vicecomes, Vicounte.*

² 'Sub nomine et honore Ducis dicti loci.'

³ 'Quae quidem omnia . . . praedicto ducatus praesenti carta nostra pro nobis et heredibus nostris annectimus et unimus eidem in perpetuum remansura; ita quod ab eodem ducatu aliquo tempore nullatenus separentur, nec alicui seu aliquibus aliis quam dicti loci Ducibus per nos vel heredes nostros donentur seu quomodolibet concedantur.'

⁴ *Rôt. Chart.*, 11 Ed. III, no. 54 (printed, *Rep. Dig. Peer*, vol. v. pp. 35-38). It is said in the *Third Rep. Dig. Peer* (vol. ii. p. 108), that 'the dignity of the Duke of Cornwall . . . was clearly personal,' but the actual words of the grant do not seem to warrant the statement.

CHAP. V. Failure to comply with this condition was to render void any letters patent of grant¹. A remedy was at the same time provided for persons wrongfully dispossessed by 'colour' of such letters patent². Grants of lands by the King were further restrained in the year 1402, by the provision (somewhat difficult of interpretation) that none were to be made except to deserving persons³; but in the year 1404 the Queen and princes of the blood were exempted from the provisions of the Act of 1399 relating to petitions for grants⁴. In the year 1429 it was enacted that all lands which had been seized into the King's hands should be retained until a month had elapsed after the return of the Inquisitions in which the facts were set forth. Any letters patent of grant made before that time were to be void, in order that any one disputing the King's title might have due opportunity of proving his case⁵.

They had little effect at first.

The effect of these Acts there can be little doubt, was to check by degrees the grant of Crown lands, and so to prepare the way for the grant of the higher dignities of the peerage without any corresponding assignment of lands. It was not, however, until the fourth year of the reign of Henry V that the Acts appeared to have had any effect upon official instruments relating to the creation of Dukes, Marquesses, and Earls. The Sheriff of Devonshire having been commanded to pay to the Duke of Exeter forty pounds *per annum* out of the issues of his county, a clause was at the same time introduced (apparently with reference to the Act of 1 Henry IV), 'Notwithstanding the preferment of ten thousand pounds made in our Parliament lately held at Westminster⁶.'

Grants of lands associated with dignities in Normandy

The English successes in France were followed about this time by the grant of various dignities in Normandy to men of English birth. John de Gray obtained the county of Tancarville in terms which indissolubly associated the

¹ Stat. 1 Hen. IV, cap. 6.

² Stat. 1 Hen. IV, cap. 8.

³ Stat. 4 Hen. IV, cap. 4.

⁴ Stat. 6 Hen. IV, cap. 2.

⁵ Stat. 8 Hen. VI, c. 16.

⁶ *Rot. Lit. Claus.*, 4 Hen. V, m. 10 (*Rep. Dig. Peer*, vol. v. p. 183).

dignity with the lands¹. The Earl of Salisbury acquired the county of Perche², and William Bouchier the county of Eu³, in a similar manner. So also Gaston de Foix was created Comte de Longueville, and had a grant of the county of Longueville in support of it⁴. It is apparent from these instances how familiar the minds of men living in the reign of Henry V must still have been with the idea of a county or earldom associated with the tenure of lands.

CHAP. V.
in the
reign of
Henry V.

It was not until Henry VI had been more than ten years upon the throne that distinct references began to be made to the Statutes in restraint of the grants of lands in the hands of the King. Humphrey, Duke of Gloucester, a son of Henry IV, presented a petition to the King in Parliament. He had, it seems, been created Earl of Pembroke and Duke of Gloucester, for life, by his brother Henry V⁵, who granted to him and the heirs of his body, just before the creation, the county of Pembroke with all its issues and profits under the name of the Castle and Lordship of Pembroke, and the Castle and Lordship of Tenby. Through some inadvertence a grant had been made, out of the issues of the same county, of twenty pounds *per annum* for the better support of the earldom, and of forty pounds *per annum* for the better support of the dukedom, and this of course was nugatory, since the Duke, as Earl of Pembroke, already enjoyed the whole of the county revenue. The possessions of the alien Priories having been seized into the King's hand in the eighth year of the reign of Henry V, the Duke now prayed that he might have a grant of the possessions

The earl-
dom of
Pembroke
still asso-
ciated with
the county
in the
reigns of
Henry V
and
Henry VI.

¹ *Rot. Lit. Pat. Norm.*, 6 Hen. V, part ii. m. 41, no. 78 (printed, *Rep. Dig. Peer*, vol. v. pp. 186-7).

² *Ib.*, 7 Hen. V, part i. m. 63, no. 232 (printed, *Rep. Dig. Peer*, vol. v. p. 187).

³ *Ib.*, 7 Hen. V, part i. m. 4 (printed, *Rep. Dig. Peer*, vol. v. p. 188).

⁴ *Ib.*, 7 Hen. V, part i. m. 35, no. 64 (printed, *Rep. Dig. Peer*, vol. v. pp. 188-9).

⁵ *Rot. Lit. Pat.*, 2 Hen. V, part i. m. 36 (printed, *Rep. Dig. Peer*, vol. v. p. 171).

CHAP. V. of the alien Priory of Pembroke, to him and the heirs male of his body in satisfaction of the sums of twenty and forty pounds *per annum* which had been granted to him, and from which he had received no profit. He at the same time prayed that he might have a grant of the earldom and dukedom to him and the heirs male of his body instead of for life only. Here he introduced a clause which recurs again and again in the same or similar form in later grants of dignities—‘Notwithstanding that express mention is not made in this petition of the true value of the priory, &c., or of that which the petitioner has of your gift or the gift of your progenitors, and notwithstanding any statute or ordinance to the contrary.’ He obtained the earldom and dukedom in the terms desired, but the priory during the King’s pleasure only¹. These very instructive transactions tell us how the Earldom of Pembroke was still associated with the county of Pembroke in the reign of Henry V, and lead us almost insensibly to that new state of affairs in which earldoms and higher dignities became strictly personal.

The earldom of Arundel held to depend upon an estate of inheritance in the castle and honour of Arundel in the reign of Henry VI.

One of the great essentials of earldoms by tenure seems to have been that the holder must have taken the lands by inheritance, and not by purchase, except of course when he acquired them directly from the Crown. Thus in the famous case of the Earldom of Arundel, when John Fitz-Alan, the heir in tail male of Richard Fitz-Alan, and tenant in tail male of the castle and honour of Arundel, was admitted in Parliament to be Earl of Arundel, he was so admitted, not simply as being in possession of the castle and honour, but because they had descended to him by special right of inheritance². The admission, too, was evidently made with much hesitation, not because there was a doubt whether any one having by descent the fee simple of the castle and honour was Earl of Arundel, but because John Fitz-Alan’s estate of inheritance was not a fee simple like that of Richard Fitz-Alan, from whom he derived

¹ *Rot. Parl.*, 11 Hen. VI, no. 36.

² *Ib.*, 11 Hen. VI, nos. 32-35.

his title. It was probably for this reason that a clause was introduced to save the right not only of the King, but also of John Mowbray Duke of Norfolk (then a minor), who, as the representative of one of Richard's daughters and coheirs, opposed Fitz-Alan's claim. CHAP. V.

The doctrine that the Earldom of Arundel was an Earldom by tenure seems to have been, at this time, admitted on all sides. The opposition of the Duke of Norfolk was itself made on the ground that Fitz-Alan's title to the castle and honour was not good, and that, if he were recognized as Earl, those who had a better claim would be prejudiced.

In the fourteenth year of the reign of Henry VI, it is clear, the common opinion was that there could be no Earl without lands. In a case which was then argued it was stated by counsel that proceedings to outlawry could not be taken against an Earl in a civil action because it was a principle of law that, unless he had lands, a man could not be understood to be an Earl. Counsel on the other side did not dispute the proposition, and merely said that this was not the only cause which exempted an Earl from proceedings to outlawry, but that another cause existed in the dignity of his name, as such proceedings could not be taken against a Duke, an Earl, or a Baron ². It was an accepted opinion in the same reign that there could not be an earldom without lands.

Seven years later the reversion of the Earldom of Pembroke was granted by the King to William de la Pole, Earl of Suffolk, and Alice his wife, and the heirs male of their bodies, should Humphrey, Duke of Gloucester, die without heir of his body. They were also to have, with the same limitations, the castle and lordship of Pembroke, and the castle and lordship of Tenby, under which description the county of Pembroke had passed to Humphrey, Duke of Gloucester. The earldom and the county were Grant of the reversion of the Earldom and County of Pembroke, with a 'notwithstanding' clause referring to the Acts in restraint of the grant

¹ Subsequent disputes respecting this earldom were settled by Act of Parliament (3 Charles I, cap. 4). It seems unnecessary to discuss this particular case at greater length, because the general principles affecting earldoms and lands are capable of better illustration from cases which have not given rise to heated controversies.

² *Year Book*, 14 Hen. VI, no. 9. fo. 2.

CHAP. V. thus still united, but the 'notwithstanding' clause was introduced into the patent¹; and the Acts to restrain the grants of Crown lands seem afterwards to have had some effect in dissociating dignities from lands.

The clause afterwards became merely formal, and was introduced when no lands had been granted.

For the ancient custom of granting to an Earl the third part of the proceeds of the county court, there had long been substituted the practice of granting a fixed annual sum to be paid out of the issues of the county to the Earl, Marquess, or Duke. This continued to be the custom long after the 'notwithstanding' clause was introduced into the patents or charters of creation, but it soon came to be the only mark of territorial connexion between the Earl, Marquess, or Duke, and any county from which he might happen to take his title. At first the clause had reference to actual grants of lands made in connexion with the creation of the Earls and others. It was afterwards introduced, as a mere form, in accordance with precedent, in cases in which there had not in fact been any grant of lands, or even of other profits, beyond the conventional allowance out of the revenues of a county, known as creation money. In this way also it seems to have been used in some of the creations of baronies by letters patent.

Illustration from the case of George Neville Duke of Bedford, in the reign of Edward IV.

When, in the reign of Edward IV, a marriage between George Neville and the King's daughter Elizabeth was in contemplation, the King created his proposed son-in-law Duke of Bedford. He and the heirs male of his body were, as usual, to have forty pounds a year out of the revenues of the counties of Bedford and Buckingham. The 'notwithstanding' clause was introduced into the charter², according to the usage, but subsequent events show that it was, in this case, founded on a fiction.

He was degraded by Act of Parliament

In virtue of this charter George Neville bore for some years the title of Duke of Bedford, but eventually lost it because he had not lands to support it. His case is unique

¹ *Rot. Lit. Pat.*, 21 Hen. VI, part ii. m. 1 (printed, *Rep. Dig. Peer*, vol. v. p. 240).

² *Rot. Chart.*, 8-11 Ed. IV, no. 3 (printed, *Rep. Dig. Peer*, vol. v. pp. 377-378).

in the history of the peerage. He did not marry the King's daughter, and he did not obtain any grant of lands. At the time of the proposed marriage 'for the great love' the King bore to George's father, he 'intended to have given to the said George, for sustentation of the same dignity, sufficient livelihood.' George's father, John Neville, Marquess of Montague, however, was concerned with the Earl of Warwick in restoring Henry VI to the throne, and fell at the battle of Barnet, fighting on the Lancastrian side. He was attainted after his death, and, by corruption of blood, George became incapable of inheriting his lands or his dignities. An Act was therefore passed in the seventeenth year of the reign of Edward IV, to degrade George Neville from his dukedom. Its English words are remarkable: 'For so much as it is openly known that the same George hath not, nor by inheritance may have, any livelihood to support the said name, estate, and dignity, or any name of estate, and oft times it is seen that when any Lord is called to high estate, and have not livelihood conveniently to support the same dignity, it induces great poverty, indigence, and causes oft-times great extortion, embracery, and maintenance to be had, to the great trouble of all such countries where such estate shall hap to be inhabited. Wherefore the King by the advice and assent of his Lords Spiritual and Temporal and the Commons in this present Parliament assembled, and by authority of the same, ordaineth, establisheth, and enacteth that from henceforth the same erection and making of Duke, and all the names of dignity given to the said George or to the said John Neville his father be from henceforth void and of no effect, and that the same George and his heirs from henceforth be no Dukes, nor Marquess, Earl, nor Baron, nor be reputed nor taken for no Dukes nor Marquess. Earl, nor Baron, for no erection or creation afore made, but of that name of Duke, and Marquess, Earl and Baron in him and his heirs cease and be void and of none effect, the said erection or creation notwithstanding¹.

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because he
had no
estate to
support his
dukedom.

¹ *Rot. Parl.*, 17 Ed. IV, no. 16 (printed, vol. vi. p. 173).

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His dignity
was purely
personal.

Thus it was admitted that George, Duke of Bedford, could bear the title as a personal dignity not associated with the tenure of lands, and without any means of supporting the honour. It was at the very same time declared to be inconvenient and mischievous that he or others of high estate should be in such a condition. The remedy of degradation had never before been applied for the same cause; it could hardly have been then applied had the earlier course been followed and a grant of lands been made to support the dukedom at the time of its creation.

All subsequent
creations
purely
personal.

The degradation of the Duke of Bedford for want of means was never used as a precedent. The form of creation used in his case was, however, followed in subsequent grants of earldoms, and dignities of higher grade. The clause 'notwithstanding,' as in the charter to George Neville, was uniformly introduced in the later creations of the reign of Edward IV. It appears in the Letters Patent making Edward Plantagenet Earl of Salisbury¹. It appears in the charter by which William Herbert was created Earl of Huntingdon on surrendering the Earldom of Pembroke². It appears in the charter by which Edward, Prince of Wales, son of Edward IV, was created Earl of Pembroke³, and in the charter by which he was created Earl of March⁴. It appears in the charter by which William, Lord Berkeley, was created Viscount Berkeley⁵, and in the charter by which Lord Lovel was created Viscount Lovel⁶. In these cases there had not been, it is believed, any specific grant of lands preceding and relating to the grant of the dignity⁷.

¹ *Rot. Lit. Pat.*, 17 Ed. IV, part ii. m. 16 (printed, *Rep. Dig. Peer*, vol. v. p. 413).

² *Rot. Chart.*, 15-22 Ed. IV, no. 11 (printed, *Rep. Dig. Peer*, vol. v. pp. 417-418).

³ *Ib.*, no. 10 (printed, *Rep. Dig. Peer*, vol. v. p. 419).

⁴ *Ib.*, no. 9 (printed, *Rep. Dig. Peer*, vol. v. p. 419).

⁵ *Ib.*, no. 6 (printed, *Rep. Dig. Peer*, vol. v. pp. 420-421).

⁶ *Ib.*, no. 1 (printed, *Rep. Dig. Peer*, vol. v. p. 421).

⁷ Castles and lands in Wales and the Marches were granted to the Prince of Wales just before he was created Earl of March, but they

As soon as the 'notwithstanding' clause had become a mere form, and the grant of lands in association with a dignity a fiction, a newly-created title of honour could have been only personal. In this light it must have been regarded, so far as grades in the peerage above that of Baron were concerned, at the end of the reign of Edward IV. The transition from the idea that newly conferred dignities were personal to the idea that all were personal alike was natural, and, indeed, inevitable. CHAP. V.

were not expressly associated with any dignity. *Rot. Lit. Pat.*, 17 Ed. IV, pt. 2. m. 24). And, four years after he was created Earl of Pembroke, an exchange was effected between him and William Herbert, Earl of Huntingdon, in virtue of which the castle, town, and lordship of Pembroke, and various lands became annexed to the Duchy of Cornwall, but they were no longer described as 'the County of Pembroke.' (*Rot. Parl.*, 22 Ed. IV, no. 12.)

CHAPTER VI.

EARLY BARONIES: TENURE.

CHAP. VI.

Barons distinguished from Earls as having no official dignity.

THE history of earldoms, and of the manner in which they became hereditary, and became associated with the tenure of land, may be of some service as a guide in tracing the hereditary dignity of Baron, and its early association with the tenure of land also. It must, however, be remembered that a Baron, merely as Baron, never had, like an Earl, any official position, and consequently never had, like an Earl, an official dignity.

Thanes sometimes described as Barons.

It has been sometimes supposed that the Thanes who existed in England before the Conquest were in a position similar to that of the Barons who existed afterwards. Unfortunately the writers who lived near the time of the Conquest, whether French or English, made somewhat rough and ready translations of words in the two languages. The French authors who lived a little later than the Conquest, naturally also reduced the events they were describing as far as they could into the language of their own time. We thus find the higher grades of society in England, during and even before the reign of Edward the Confessor, described precisely as if they were Norman or other French nobles. When Earl Godwin was brought to trial, according to Geoffrey Gaimar :

‘There was present a great Baronage,
Earls, and Barons, and many a Sage¹.’

The accusation was described by the French word *appel*, or

¹ ‘Isci aveit mult grant Barnage,
Contes, Barons, maint home sage.’

appeal, and with regard to that and his answer Godwin was made to say, 'Let all these Barons speak what is just ¹.'

As there were Earls before the Conquest so there were Lords to whom their 'men' owed a certain obedience. There was thus a kind of likeness between some, at any rate, of the Thanes and the Norman Barons. The Thanes who were great landholders might, so long as they retained their possessions, naturally be called Barons by the French, and, when the French gained the same possessions, they too, were naturally called Barons. There appears, however, to have been this great distinction, that before the Conquest, the Thanes or other Lords did not hold their land by knight-service as the Barons did after the Conquest. The word Baron did not exist in the English (or rather *Englisc*) language before the Conquest, but was introduced from France. With it came tenure in chivalry, or by knight-service, together with all the feudal incidents.

In this fact we have the key to the position of the early Baronage in England—to the position of the great tenants-in-chief of the Crown—who were landholders owing military service to the King, and suit to his Court. It is true that the change was not complete on the morrow of the battle of Hastings, and that, in the absence of records, the process by which it was effected cannot be traced in detail with absolute precision. There is, however, no doubt, as has already been shown, that the Baronage had practically become denationalized in the reign of Henry I. It consisted chiefly of foreigners owing allegiance to a King who was the son of the Conqueror by a daughter of Baldwin, Comte de Flandre. Their ideas of government, of the tenure of land, and of the administration of justice, were French.

A few of the Barons were Earls also, who, having originally an official dignity, differed in that respect from

Difference between the Pre-Norman Thanes and the Barons of the French type.

The Baronage after the Conquest consisted of the great tenants-in-chief of the Crown, owing military service to the King, and suit to his Court.

¹ Geoffrey Gaimar (Rolls Series), ll. 4900-4916. The last passage is in French:

'De vostre apel et de mon respons
Dient en dreit tut ces barons.'

CHAP. VI. their compeers. The Barons, however, merely as Barons, held no office, and the descent of their lands was untrammelled by any of the difficulties incident to the descent of offices. The hereditary principle which prevailed in Normandy was naturally applied to the lands acquired by the new comers in England. As soon as we find any clear light upon the subject, we find the barony descending to the heir without doubt or question, but subject of course to the usual feudal burden of relief. 'As soon,' says Glanvill, who lived in the reign of Henry II, 'as one of the King's chief Barons dies, the King immediately retains the barony in his hand until the heir (though of full age) has given sufficient security for his relief¹.' The amount payable for a barony in chief was at the pleasure and mercy of the King². This restraint on the succession seems to have constituted one of the grievances of the Barons in the reign of King John. It was provided in his Great Charter that, when one of the King's Earls or Barons died, and the heir was of full age, he should have his inheritance on payment of the ancient relief, which was defined to be one hundred pounds for the entire barony, whether of an Earl or of any other Baron³.

The Baron a holder of an entire barony or of part of a barony.

This was in the transition period before the earldom had lost its official character, and become more closely associated with the tenure of lands of the county. Similar words were introduced into the Great Charter of the ninth year of the reign of Henry III, though the readings of the various manuscripts vary. According to the better text, which agrees with the words of Bracton, the Earl had then to pay one hundred pounds as the relief for an entire county (or earldom), and the Baron one hundred marks as the relief for an entire barony⁴. As, however, it rarely happened that the possessions of an Earl (except in the case of a county Palatine) were exactly co-extensive with

¹ Glanvill, lib. ix. cap. 6.

² *Ib.* cap. 4.

³ *Magna Charta* (King John), cap. 2.

⁴ *Magna Charta*, 9 Hen. III, cap. 2 ; Bract. 84.

the boundaries of a county, it can hardly be said that very great precision was attained by the words of the later charter with regard to earldoms. With regard to baronies other than earldoms, the words are, if possible, still more obscure, because, although Barons are again and again described as tenants-in-chief of the King as of his Crown, it does not appear that there was any uniform rule to determine the extent of their holdings. It would also seem that whatever may have been at first supposed to constitute an entire barony, it was quite possible for any Baron to hold either less or more. In later times, when the burdens of a Baron were in question, it was necessary for any one wishing to escape them to prove that he did not hold either a barony or part of a barony.

Whatever vagueness, however, there may be with regard to details, it seems perfectly clear that until the end of the reign of Henry III, at any rate, a Baron was a person holding lands of the Crown, and owing military service to the King. It is hardly necessary to consider the etymology of the word, which is, perhaps, the equivalent of 'man.' According to Bracton it meant 'the strength of war¹,' and the use of this expression shows with sufficient plainness that the Baron was a great landholder, bound by the feudal obligations under which he held his possessions, to bring into the field a force proportionate to their extent.

His military character: 'the strength of war.'

It has sometimes been maintained that the Greater Barons of the reign of John and of previous reigns were those only who held by Grand Sergeanty². This has, however, not been proved, though the tenure was in later times held in the highest estimation, and though it survived the Act of Charles II which changed other tenures into socage. There is no proof that Grand Sergeanty was in equal honour in the time of Edward I, and still less that it gave the sole claim to the degree of a Greater Baron in earlier times. It is not even clear that a tenure by Grand

Tenants by Grand Sergeanty not of necessity Barons, nor of necessity summoned to Parliament: an instance.

¹ Bract. 5 b, 'robur belli.'

² Nicolas, *Historic Peerage of England*, ed. Courthope, p. xviii.

CHAP. VI. Sergeanty was at first necessarily a tenure of the King *in capite*, though in Littleton's days it was¹. Britton, on the contrary, refers by implication to cases in which fees are held by Grand Sergeanty, but not directly of the King², and Bracton uses similar language. It is, however, certain that the lineal descendant and heir of a Baron who held by Grand Sergeanty in the time of the Conqueror was not necessarily summoned to Parliament as a Baron in the time of Edward I. Reginald de Argenton, for instance, held by Grand Sergeanty³ in the reign of Richard I. He was the son of a Reginald de Argenton who lived in the reign of Henry I, and the grandson of another Reginald de Argenton who had a grant from the Conqueror⁴. Yet, the descendants of these Barons were not summoned to Parliament in later reigns, and if any descendant and heir were now living, he would have no right to the hereditary dignity of a Baron on the ground of his descent from a Baron by writ of summons.

The character of Baronies and Barons not altered in the reign of Henry III.

It is usual to describe the Barons, who in legal documents are styled 'the King's Barons,' or 'the King's Chief Barons,' or 'the Greater Barons' as 'Barons by tenure' until the reign of Henry III, and then to assume a violent change of status, and to regard all Barons as 'Barons by writ,' until one was created by Patent in the reign of Richard II. There is, however, no evidence of any such revolution. The idea seems to have sprung from a misconception—itsself arising out of a tendency to forget the difference between ancient and modern conditions of society.

As yet no individual title of Baron : descent of lands.

It is the fact that persons holding land under certain conditions were collectively known as Barons. It is the fact that they were regarded as men of power subordinate to the King⁵. It is not the fact that each of them had

¹ Litt. Sec. 156.

² Britton, lib. iii. cap. 4. sec. 4; Bract. 35 b.

³ *Per sergantium Pincerniae*, Eyre Roll, Hertford, 10 Ric. I (printed in '*Rotuli Curiae Regis*,' i. 162).

⁴ '*Rotuli Curiae Regis*,' 1 John (printed, vol. i. p. 392).

⁵ Bract. 5 b.

individually a title of honour as Baron A, or Baron B. CHAP. VI.
 Each of them was liable to perform certain duties, and, as will be shown in a subsequent chapter, enjoyed certain privileges, but he bore hardly any resemblance to a Baron of the nineteenth century. His lands, subject to the feudal relief, descended to his heir, and with them his duties and his privileges. They might even descend to a female heir, as when he left only one daughter, or to female coheirs, as when he left several daughters. They might be divided, with the restriction that where there was only one castle, or capital messuage or dwelling of any earldom or barony, it was not partible but went to the eldest of the coheirs, as a symbol of indivisible strength descending from a time when it was said that the realm was composed of earldoms and baronies¹. The military services for the lands had to be rendered whether in the hands of one person or of many. The King could summon to his Court, his Council, or his Parliament the husband of any of the coheirs if he saw fit. In certain cases he had even greater power. There was an important difference between the case in which a Baron, tenant in fee, died leaving three unmarried daughters, and the case in which he left two elder married daughters and one youngest unmarried daughter as his coheirs. In the latter case the marriage of the unmarried daughter of one of the King's Barons who held of the King in chief belonged to the King. He could give her, together with the whole of the inheritance of which her father died seised, to any one of his knights whom he might select, and her sisters could not recover anything against her during her life. This was the law at the beginning of the reign of Henry III, and it was then believed to have prevailed since the time of the Conquest².

In this instance it will be observed that there was no separation of the dignity from the inheritance. The

¹ Bract. 76-76 b; Britton, lib. iii. cap. 8; Fleta 313.

² Fitz-Herbert's Abridgement, Tit., *Prescription*, 56 (3 Henry III). This case is cited in Co. Litt. 165 a, but the use there made of it is hardly warranted by the actual words of the report or abridgement.

CHAP. VI. youngest daughter remained, as it is expressed in the report, 'in her father's inheritance.' The husband of course represented her in all rights and liabilities, and, as her estate was regarded as an estate of inheritance so was that of the husband so long as they both survived.

A barony did not necessarily give 'a voice in Parliament.'

Though, however, the appellation 'Baron' was thus indissolubly associated with the tenure of lands, that tenure could not have had the effect which has sometimes been attributed to it. The theory that 'till the time of King Richard I, or of King John, each man to whom the Crown gave lands to hold by knight's service *in capite* was thereby made a Baron and Peer of the Realm, and had a voice in Parliament,' may at one time have been the 'received orthodox opinion amongst all heralds and antiquarians¹,' but it has no solid basis of fact. It is doubtful whether, in those early days after the Conquest, there was any such right as a right to a voice in Parliament, and it has yet to be proved that the term 'Peer of the Realm' was known in England.

No evidence from Henry I to Henry II that a summons was regarded as a privilege.

There is no trace of any desire on the part of the Barons to be summoned to the King's Great Council as a privilege and an honour before the reign of John. Earlier charters² contain many of the points for which the Barons then contended, but not any reference to the summons to the Common Council of the Realm, which was a prominent feature in John's Charter.

Even the summons conceded by John's *Magna Charta*,

Even in John's reign, too, the summons was desired not as an honour but as the means of mitigating demands for money³. It was only when an exceptional aid or scutage was to be assessed that the Barons wished to be called

¹ John Smyth, of Nibley, *Lives of the Berkeleys* (ed. Sir John Maclean), vol. ii. p. 50.

² For instance, the Charter of King Henry I, A.D. 1100. See also the two Charters of King Stephen, and the Charter of King Henry II, in all of which the Charter of Henry I is mentioned. These have been conveniently brought together in the notes to Blackstone's Tracts, 286-288 (*The Great Charter*). They are also printed in the Statutes of the Realm.

³ King John's *Magna Charta*, cap. 12 and cap. 14.

together. In that case the King agreed that he would cause the Archbishops, Bishops, Abbots, Earls, and Greater Barons to be summoned individually, and that he would also cause to be summoned collectively, by his Sheriffs and Bailiffs, all those who held of him *in capite*, that in every summons he would express the reason for which it was made, and that the particular business in hand should proceed on the appointed day, and be settled by the advice of those present.

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was desired as a protection against extortion, rather than as an honour.

The classes of persons to whom the separate writs of summons were to be directed were, no doubt, the classes of persons who were subsequently known as Peers of the Realm, and constituted the House of Lords. They had already acquired some privileges which were afterwards enjoyed by Peers, but it does not, therefore, follow that the laymen among them had as yet attained the position of hereditary legislators, or legislators by tenure. That was gained by a sort of prescription in a later generation.

The Barons had not yet acquired the position of hereditary legislators.

The doctrine that between the accession of King John and the death of King Edward I (or as it is sometimes more precisely stated, in the reign of Henry III¹), the position of a Baron ceased altogether to depend upon territorial possessions and became merely personal, is contradicted by the strongest evidence. At the very time at which this change has been said to have been complete, there issued, by royal authority, a famous law book, in which there is a passage not to be reconciled with the theory that a Baron's dignity was independent of lands held by barony. 'Kings may not aliene the rights of their crown or of their royalty so as not to be revocable by their successors. It is nevertheless permissible for baronies and other demesnes and liberties to be granted by Kings, sometimes in frank-almoign, and sometimes in order to have the prelates, and the other discerning persons of the realm as part of the

In the reign of Edward I the reason expressly alleged for the grant of baronies (in the sense of lands) was that the grantees might be liable to a summons to Parliament.

¹ The statement is made in the preface to Camden's *Britannia*, but the existence of the alleged law is not precisely indicated, and it has never been traced to any document of authority.

CHAP. VI. Council, in such manner that they may be capable of being summoned to the King¹.'

All holders
of baronies
were,
however,
not
necessarily
summoned.

From this important and authoritative statement of the law it is clear that as late as the twenty-second year of the reign of Edward I the summons to any Council, whether the Common Council of the Realm or any other, was, if regarded as a privilege, certainly regarded not less as a burden, incident to the possession of land. It is also clear that the King might summon as a Baron whomsoever he pleased, if the person was liable to the summons by reason of holding a barony, but there is not the least indication that a person holding a barony could claim to be summoned, or would even wish to be summoned on all occasions, if the King did not desire his presence. When the object for which the Common Council of the Realm, or Parliament, was called together was the grant of an extraordinary aid to which the Baron would have to contribute, it might seem that he would have the right to be summoned under the provisions of King John's *Magna Charta*, if he ranked as one of the *Barones Majores*, but this provision had already disappeared from *Magna Charta* as confirmed by Henry III.

The
summons
was at the
discretion
of the
King.

Particular instances are found to be in harmony with the general principles involved in Britton's statement of the law. It would be very difficult to show that any of the laymen beneath the rank of Earl who were called to advise the King in the reign either of Henry III or of Edward I did not hold a barony or part of a barony. It may be true that some of those who were summoned on any occasion held less land than some others who were not summoned, but the reason is apparent. In times of trouble and danger a wise King, such as was Edward I, would not wish for the advice of men deficient in wisdom. He probably knew personally or by repute the character and abilities of his Barons, he probably had his own likes

¹ Britton, lib. ii. cap. 3. sec. 3. There are similar passages in Bracton, 14, and in Fleta, 3, 4, 183, though not so clearly expressed.

and dislikes, and he probably desired the presence of those who were agreeable and who might be expected to be useful to himself. When wars arose, moreover, it was useless to send a formal summons for attendance in Parliament to men whose services were required in the field. CHAP. VI.

For many generations the best proof that a man was a Baron was the proof that he held lands by barony. When Barons wished to assert their privilege of exemption from being sworn on juries, even at the end of the reign of Edward III, the mere summons to Parliament was not sufficient to prove their right. Ralph de Everden, knight, brought into the Court of Common Pleas a writ from the Chancery, and also a writ of Privy Seal, reciting that he was a Baron, and commanding the Justices to discharge him from taking any oath on any jury whatsoever. The Chief Justice examined him, enquiring whether he held by barony, whether he and his ancestors had always held by barony, and whether they had always come to Parliament as a Baron should. He answered that he held by a certain part of a barony, and that he and his ancestors had so held always. And thereupon, after good consideration, he was absolutely discharged¹, or, in other words, his privilege as a Baron was admitted.

In the reign of Edward III a Baron could not prove his status without showing that he held by barony or by part of a barony.

According to the established legal opinions, therefore, a Baron was still a person whose status could be proved only by his tenure. This rendered him liable to military and Parliamentary service; this gave him any privileges which, as a Baron he was entitled to enjoy.

The transition from the stage in which the summons to Parliament was regarded solely as a burden to that in which, though still associated with the tenure of lands, it was regarded as a privilege may be traced, in one way, by the transition from the period when the number of Barons summoned appears merely capricious to that in which it becomes nearly uniform.

Stages of transition from burden to privilege.

The number of Barons summoned in the reign of The number of

¹ *Year Book*, M., 48 Ed. III, fo. 30. no. 18.

CHAP. VI. Edward I varied with almost every Parliament, even when the word Parliament is interpreted according to modern ideas, and not according to the far less precise use of the term in the contemporary records. For the Parliament (including Lords Spiritual and Temporal, and Commons), which was to meet on November 13, 1295, there were nine Earls and forty-one Barons summoned¹, but for the Parliament which was to meet on November 3, 1296, only six Earls and thirty-seven Barons². For the Parliament which was to meet on March 6, 1299-1300, there were eleven Earls and ninety-nine Barons summoned³; but for the Parliament which was to meet on January 20, 1306-1307, only eighty-six Barons, with twelve Earls, including the Prince of Wales, as Earl of Chester⁴.

Barons summoned capriciously variable in the reign of Edward I.

And in the reign of Edward II. In the first year of the reign of Edward II (1307) a Parliament was to meet on October 13, but only nine Earls and seventy-one Barons were summoned⁵. For the Parliament to meet on April 27, 1309, nine Earls were summoned and eighty-one Barons⁶. Towards the end of the reign of Edward II (when a Parliament was to meet on July 15, 1321), nine Earls and ninety Barons were summoned⁷. To the Parliament which was to meet on November 14, 1322, ten Earls were summoned and fifty-two Barons⁸; and one Earl (of Surrey), whose name has not

¹ *Rot. Lit. Claus.*, 23 Ed. I, m. 3 d (printed in *Parl. Writs*, ed. Palgrave, vol. i. p. 31, as well as in *Reports on the Dignity of a Peer*).

² *Ib.*, 24 Ed. I, m. 7 d (printed, *Parl. Writs*, vol. i. p. 42, as well as in *Rep. Dig. Peer*).

³ *Ib.*, 28 Ed. I, m. 17 d (printed, *Parl. Writs*, vol. i. pp. 82-83, as well as in *Rep. Dig. Peer*).

⁴ *Ib.*, 34 Ed. I, m. 2 d (printed, *Parl. Writs*, vol. i. pp. 181-182, as well as in *Rep. Dig. Peer*).

⁵ *Ib.*, 1 Ed. II, m. 19 d (printed, *Parl. Writs*, vol. ii. div. ii. p. 2, as well as in *Rep. Dig. Peer*).

⁶ *Ib.*, 2 Ed. II, m. 11 d (printed, *Parl. Writs*, vol. ii. div. ii. pp. 25-26, as well as in *Rep. Dig. Peer*).

⁷ *Ib.*, 14 Ed. II, m. 5 d (printed, *Parl. Writs*, vol. ii. div. ii. p. 235, as well as in *Rep. Dig. Peer*).

⁸ *Ib.*, 16 Ed. II, m. 26 d (printed, *Parl. Writs*, vol. ii. div. ii. p. 262, as well as in *Rep. Dig. Peer*).

been found among the writs of summons, sent a proxy¹. To the Parliament which was to meet on February 23, 1323-1324, ten Earls were summoned but only forty-nine Barons². To the Parliament which was to meet on November 18, 1325, only four Earls and forty Barons were summoned³. In each of the cases mentioned the Parliament was a true Parliament from the modern point of view, as it included the Lords Spiritual and Temporal and the Commons.

At the beginning of the reign of Edward III a similar uncertainty still prevailed with regard to the number of Lords Temporal who were to come to Parliament. Thus in the first year six Earls, and forty-six persons who were presumably Barons⁴ were summoned to meet with the Prelates and Commons at Lincoln on September 15. To the Parliament which was to meet in the following February (in the second year) at York, six Earls were summoned, and fifty Barons⁵. In the fourth year eleven Earls and fifty Barons were summoned to a Parliament to meet at Winchester, in January⁶. In the seventh year twelve Earls and sixty-three Barons were summoned to a Parliament to meet at Northampton, in the February of the eighth year⁷. In the eleventh year there was summoned to meet in September an assembly which it is difficult to distinguish from a Parliament in the modern sense of the term. Writs issued to all the counties for the election of knights of the shire and burgesses. The Bishops were summoned in the

Similar irregularity in the early part of the reign of Edward III.

¹ Original Proxies preserved among Parliamentary Petitions (printed, *Parl. Writs*, vol. ii. div. ii. p. 267, no. 30).

² *Rot. Lit. Claus.*, 17 Ed. II, m. 27 d (printed, *Parl. Writs*, vol. ii. div. ii. p. 289, as well as in *Rep. Dig. Peer*).

³ *Ib.*, 19 Ed. II, m. 27 d (printed, *Parl. Writs*, vol. ii. div. ii. pp. 334-335, as well as in *Rep. Dig. Peer*).

⁴ *Ib.*, 1 Ed. III, part ii. m. 16 d (printed in *Rep. Dig. Peer*, vol. iv. p. 377).

⁵ *Ib.*, 1 Ed. III, part ii. m. 3 d (printed in *Rep. Dig. Peer*, vol. iv. pp. 379-380).

⁶ *Ib.*, 4 Ed. III, m. 41 d (printed, pp. 392-393).

⁷ *Ib.*, 7 Ed. III, part ii. m. 3 d (printed, pp. 422-424).

CHAP. VI. usual form, and Abbots also. Thirteen Earls were summoned and only thirty-three Barons¹. In some subsequent years we find the number of Earls who were summoned varying from eight to thirteen, and the number of Barons rising again to more than forty. In the twentieth year, however, there were but five Earls and eleven Barons summoned to the Parliament which was to meet at Westminster in September². The reason, no doubt, was that many of those who would otherwise have been called, were engaged with the King in military service in 'parts beyond the sea.' It is quite possible, too, that in previous years the wars with Scotland and France, as well as, perhaps, in some cases other political events may have caused, wholly or in part, the striking differences in the numbers of the Temporal Lords who were required to attend successive Parliaments.

In the twenty-first year of Edward III, eleven Earls and thirty Barons were summoned to meet in Parliament at Westminster, in the February of the following year³. The same numbers occur in the first writs of summons to Parliament in the twenty-second year; but somewhat later, fifty-six Barons were summoned to meet at Westminster in the following February, and again when Parliament was prorogued. This prorogation, caused by the Black Death, was followed by another, which was a postponement *sine die*⁴, and the notification of which was addressed to fifty-five Barons. In the twenty-fourth year fifty Barons were summoned to the Parliament to meet at Westminster in the February of the following year⁵, the reduction in numbers having been caused probably by the ravages of the pestilence and the minority of some of the heirs of the Barons previously summoned.

¹ *Rot. Lit. Claus.*, 11 Ed. III, part ii. m. 40 d (printed in *Rep. Dig. Peer*, vol. iv. pp. 479-481).

² *Ib.*, 20 Ed. III, part ii. m. 25 d (printed, p. 559).

³ *Ib.*, 21 Ed. III, part ii. m. 9 d (printed, pp. 573-574).

⁴ *Ib.*, 23 Ed. III, part i. m. 19 d (printed, p. 585).

⁵ *Ib.*, 24 Ed. III, part ii. m. 3 d (printed, pp. 588-589).

About this time, however, there appears to be a more definite principle at work in the issue of writs of summons. The same names occur again and again, and the omission of a familiar name can usually be explained by the minority of the heir or by some grave reason of state. In the twenty-fifth year of the reign of Edward III a Parliament was summoned to meet at Westminster in the February of the following year. Those who received a summons were the Duke of Cornwall (Prince of Wales), the Duke of Lancaster, eleven Earls, and fifty-two Barons¹. It thus seems that the normal number of Barons to be summoned about the middle of the reign of Edward III ranged between fifty and fifty-five, when there were no special circumstances to diminish it. The special circumstances, however, and notably the wars with the French, were frequently in operation. Thus in the thirty-fourth year of the reign only twenty Barons and only four Earls were summoned to the Parliament which was to meet at Westminster in May². In the same year, however, after the return of the King to England, writs of summons issued in November for a Parliament to meet in the following January, and were directed to the Prince of Wales, the Duke of Lancaster, eleven Earls, and forty-four Barons³. During the remainder of the reign the Barons summoned commonly fell short of the normal number, and sometimes very far short.

In the reign of Richard II it becomes apparent that the normal number of Barons summoned had undergone a permanent diminution as compared with the early part of the reign of Edward III. During the first nine years of Richard's reign the number of Barons called to Parliament varied between forty-four and forty-nine. In the tenth year it fell to forty-two. In the eleventh year it rose to forty-five, and was destined in the end to rise much higher from a new cause which first came into

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The normal number of Barons to be summoned ranged, about the middle of the reign, from fifty to fifty-five.

The number reduced in succeeding reigns, and the summons to Parliament hereditary.

¹ *Rot. Lit. Claus.*, 25 Ed. III, m. 5 d (printed in *Rep. Dig. Peer*, vol. iv. pp. 591-592).

² *Ib.*, 34 Ed. III, m. 35 d (printed, p. 623).

³ *Ib.*, 34 Ed. III, m. 4 d (printed, pp. 625-626).

CHAP. VI. operation in that year—the creation of Barons by Patent. Partly, however, through the protracted civil wars, and partly from the sparing use of the modes of creating new Barons, either by writ or by patent, the number summoned fell rather than rose in the reigns immediately following. Thus the summons to Parliament gradually became hereditary, and no longer dependent on the caprice of the Sovereign.

The word Baron still not used as a term of individual dignity.

During all this time there appears nothing to show that the word Baron was known to the law as a term of individual dignity before the creation of a Baron by Letters Patent in the reign of Richard II, or that it was even then a description necessary for purposes of legal identification. There is, indeed, a very strong presumption to the contrary. Cases occur in the 'Year Books' or old Law Reports in which writs are held to be bad because the 'addition' of 'Earl' has been omitted, but no cases have been found in which a writ failed for want of the 'addition' or description of 'Baron.' This, however, is not all. When an Earl sues, or is sued, his dignity is always stated, or, if not, counsel raises an objection. No cases have been found in which the addition of Baron occurs, and no cases in which any exception is grounded on the omission. Persons who were summoned to Parliament as Barons were of course frequently engaged in law-suits, and it is consequently impossible that the term Baron should have been universally omitted when they were concerned, and that no exception should have been grounded on the omission, if the word had been, in law, a name of dignity in the same manner as the word Earl.

An Earl had always to be described as Earl in legal proceedings, but not a Baron as Baron.

In order to establish a proposition which may, perhaps, be somewhat startling, it may be necessary to cite a case in which the omission of an Earl's dignity proved fatal to a writ, as well as a case in which a Baron sued without any name of dignity, and in which nevertheless neither counsel nor judges raised any technical objection. In the fourteenth year of Edward III an action of replevin was brought against Hugh de Audley, Earl of Gloucester, and another. In the writ the Earl was described simply as Hugh de

Audley. Counsel at once took exception, on the ground that he was not described as Earl; and the writ failed as against him, though held good as against the other person joined with him as defendant¹. On the other hand, when Henry Fitz-Hugh, of Ravensworth (who is described in the Peerages as Baron Fitz-Hugh, and who was in fact summoned to Parliament as Henry Fitz-Hugh²), brought an action of ravishment of ward in the same year³, he is nowhere described as a Baron in the reports of the case or in the corresponding record. No exception was taken on the ground of the omission, which, in the case of an Earl, would have been a simple and sufficient reason for abating the writ; but, on the contrary, exception was taken on another point of a far more difficult and technical character.

Long after the reign of Edward III, too, when the wars of the Roses were giving new power to the Barons, the old ideas still prevailed in the Courts of Justice, and a Baron was still not as another peer. As late as the eighth year of Henry VI it was expressly decided that there was a difference between a lord who was only a Baron and a lord who was an Earl or a Duke, and that when a writ was brought by or against an Earl or Duke, he must be named by his name of dignity, but not when the writ was brought by or against a Baron⁴. In this case the plaintiff, 'Lord' Lovel, was described as knight or 'chivaler,' as persons not of higher rank than Barons commonly were in the summonses to Parliament. This word 'chivaler,' however, was itself a name of dignity⁵, and the omission of it in a case in which the party was entitled to it was fatal to a writ in which the omission occurred⁶.

A Baron need not be so described even in the reign of Henry VI.

Moreover, it was not only in the superior Courts of

In early

¹ *Year Book*, T., 14 Ed. III, no. 34.

² *Rot. Lit. Claus.*, 14 Ed. III, m. 33 d (printed in *Rep. Dig. Peer*, vol. iv. p. 517).

³ *Year Book*, M., 14 Ed. III, no. 45.

⁴ *Ib.*, 8 Hen. VI, no. 22, fo. 10.

⁵ Fitz-Herbert's Abridgement of the Law, *Nomen Dignitatis*, 3.

⁶ *Year Book*, H., 14 Hen. IV, no. 26, fo. 21.

CHAP. VI. Justice that the designation Baron was usually omitted when particular individuals who were summoned among the Barons were described. The individuals are commonly mentioned without the description of Baron, and almost as commonly without the description of Lord, in the Rolls of Parliament themselves. Thus as late as the ninth year of the reign of Edward II, Hugh le Despenser, the younger, having been accused in Parliament of an assault in Lincoln Cathedral, was committed to the custody of the marshal. He was afterwards released on bail or mainprise, and his sureties or mainpernors were all noblemen of such rank as a summons to Parliament among the Barons could confer on them or their ancestors. Yet not one of them was called in the Roll of Parliament either Baron or Lord, though one, who was an Earl (a Scottish Earl) had due recognition of his title (Robert de Umfravill, Earl of Angus). The rest were called simply Roger de Mortimer of Chirk, Theobald de Verdon, Ralph Basset, William de Ferrers, and Robert de Hastings¹.

The holder of a barony, having originally military but no official duties, was regarded after knighthood as a 'chivaler.'

The most reasonable explanation of these facts appears to be that an Earl was originally described as Earl in Parliament and Courts of Justice by reason of his official dignity, but that a Baron was not usually so called because he was regarded only as the holder of a barony or part of a barony. Ranks in the peerage above that of Earl were, as has been shown, but superior kinds of earldoms, associated at first with lands in the counties, from which they took their titles. Though, however, Barons never had any official duties, their military duties were of great importance, and it was, perhaps, for this reason that their ordinary legal designation, as soon as they had received the necessary knighthood, was 'chivaler².'

A Baron's

The dignity of a Baron could not have been considered

¹ *Rot. Parl.*, 9 Ed. II, no. 2 (printed, vol. i. p. 352).

² Even this, however, was omitted until the end of the reign of Edward III. In the reign of Henry VI it came into common use. It afterwards survived even the abolition of feudal tenures, and was handed down to modern times.

exclusively personal until a comparatively late period, and still less the right to sit in Parliament. The fact that husbands were summoned to Parliament, as it is commonly expressed, in right of their wives, is alone sufficient evidence on the point.

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dignity
long not
exclusively
personal.

Husband and wife, it is true, were one person in law; by marriage the husband became the owner of the wife's chattels, and acquired power over her realty during the time of coverture. The reason of this, however, was that her personality was lost in that of her husband, not that his personality was lost in hers. It was an established principle in the reign of Edward III that when a woman married she lost every surname except that of 'wife of' her husband¹. It would be altogether inconsistent that the husband should take a name of dignity as husband of the wife. The husband's powers over the wife's lands were, however, in the first instance acquired because he was capable of performing the military and other services by which the lands were held. It was therefore quite reasonable that he should receive a summons to Parliament to which a male holder of her lands would be liable. It must originally have been the land which was subject to the burden of the summons, whether to military service or to attend in Parliament.

Husbands
summoned
to Parlia-
ment in
virtue of
the lands
but not
of the
dignities
of their
wives.

Hugh Stafford, who was summoned to Parliament in the twelfth year of the reign of Henry IV², and subsequently, apparently on the ground that he had married Elizabeth, the daughter and heir of Bartholomew Bouchier, was summoned simply as Hugh Stafford, without any mention of a Bouchier peerage. Bartholomew Bouchier had been summoned simply as Bartholomew Bouchier in the first, second, third, fifth, seventh, eighth, and eleventh years of the reign. In modern times both Bartholomew Bouchier and Hugh Stafford are often described as Lord Bouchier. On the death of Hugh Stafford, his widow married Lewis Robsart,

Instances :
Hugh
Stafford
and Lewis
Robsart.

¹ *Year Book*, T., 14 Ed. III, no. 51, p. 323.

² *Rot. Lit. Claus.*, 12 Hen. IV, m. 2 d (printed in *Rep. Dig. Peer*, vol. iv. p. 810).

CHAP. VI. who in his turn was summoned to Parliament. apparently by reason of his marriage, in the third year of the reign of Henry VI¹, and subsequently, but simply as Lewis Robsart, though he, too, is often described as Lord Bouchier. In each of these cases the summons to Parliament is a striking illustration of the legal doctrine that a wife could not confer a name (either of dignity or otherwise) upon a husband, though during her life he gained the benefits and was subject to the burdens attaching to her lands.

Other cases of a less simple character : Robert Hungerford, Lord Molines.

There are, however, some cases, usually regarded as cases in which a husband was summoned as a Baron to Parliament in right of his wife, which are of a different character. They are cases in which the right of the Crown to summon had been in disuse, and was exercised anew in respect of an heiress's husband. Thus it is commonly said that Robert Hungerford was summoned to Parliament as Lord Molines in the twenty-third year of Henry VI, because he had married Eleanor, heiress of William Molines. It is true that he was summoned to Parliament as Robert Hungerford, knight, Lord (or lord of) Moleyns². He is the only person of all those summoned among the Barons to whom the word *dominus*, or lord, is applied on the same occasion ; and if the word were to be accepted as a title of honour it might at first sight seem to follow that he was the only lord summoned to meet the Dukes, Earls, and Viscount. His wife's father had not even been summoned to Parliament, nor had any of her ancestors since the twenty-first year of Edward III, when one was summoned as John de Molyns³. In this case it would seem either that Hungerford was held liable to a summons by reason of his wife's lands, or that he was newly created a Baron.

Edward de Grey, 'Lord Ferrers of Groby.'

In the twenty-fifth year of the reign of Henry VI, however, Robert Hungerford was again summoned, and again styled *dominus de Moleyns*. On this occasion two other persons were summoned, to whom also, and to whom alone

¹ *Rot. Lit. Claus.*, 3 Hen. VI, m. 9 d (printed, p. 861).

² *Ib.*, 23 Hen. VI, m. 21 d (printed, p. 908).

³ *Ib.*, 21 Ed. III, part i. m. 28 d (printed, p. 563).

among all the other barons. the word *dominus* was applied. CHAP. VI.
 Each had married an heiress. One was Edward de Grey. He had married Elizabeth, grand-daughter and heiress of William Ferrers of Groby, who, and some of whose ancestors, had been summoned to Parliament. William de Ferrers had been summoned as 'William de Ferrers, of Groby, knight.' The words 'of Groby' formed part of his description, because other members of the Ferrers family had for many generations been described as of other places. When Edward de Grey married the heiress Elizabeth, he also became 'of Groby,' and he was summoned as Edward de Grey, Lord of (*dominus de*) Ferrers, of Groby, knight¹. In this case it might, perhaps, be maintained, with some show of reason, that Edward de Grey had acquired, in some manner, the title of Lord Ferrers of Groby.

The other person summoned after having married an heiress was Henry Percy, Lord (*dominus de*) Ponynge or Poynings. In this case 'Poynings' might have been regarded as a territorial designation, and Henry Percy only as the holder, in right of his wife, of Poynings in Sussex, and not as Lord Poynings according to modern ideas. It might be that the reason for designating him, as well as the two others who had married heiresses, by the title of *dominus* was that he was summoned to Parliament simply as lord of certain lands. It might, however, be that the three 'lords' had the title affixed to their names to show that they were, by courtesy or otherwise, to be called Lord Molines, Lord Ferrers of Groby, and Lord Poynings.

Two years later a case occurs which hardly admits of any doubt as to the meaning of the description. William Bouchier, a knight, had married Thomasine Hankford, daughter of Elizabeth Fitz-Warine by Richard Hankford. There had been nine generations in which the name of Fulk Fitz-Warine had been borne successively by transmission from father to son. Elizabeth was the sister of the last of this line. Bouchier was summoned to Parlia-

Henry
Percy.
'Lord
Poynings.'

William
Bouchier,
'Lord Fitz-
Warine.'

¹ *Rot. Lit. Claus.*, 25 Hen. VI, m. 16 d (printed, p. 916).

CHAP. VI. ment as 'William Bouchier, knight, Lord Fitz-Waryn¹.
As Fitz-Warine is a purely family name, and no question of mere lordship over certain lands can arise it is clear that 'Lord Fitz-Warine' must have been a name of dignity, and not a territorial designation. Even here, however, many difficulties arise. Richard Hankford was never summoned to Parliament, and no Fulk Fitz-Warine had been summoned to Parliament since the year 1336—for more than a century preceding the summons to William Bouchier.

In each case the husband may have been summoned in virtue of the wife's lands, or there may have been a new creation.

A careful consideration of the facts—of the fact that among the Barons summoned to one Parliament the only persons who were styled *dominus* were those who had married heiresses, and of the fact that in two at least of these cases there is no proof of the existence of a barony, apart from the lands, in the blood of the heiress—suggests a conclusion quite opposed to the usual statement that husbands are to be regarded as acquiring the dignity of Baron in right of their wives. There are two possible alternatives; one is that the husbands were summoned because liable to the summons by reason of the lands of their wives, though the summons in respect of those lands had been for some time intermitted; the other is that in each case there was a new creation.

The particular titles were given to distinguish the bearers from other Peers of the same families.

The reason for designating each of these lords by a particular title appears to have been a desire to prevent confusion. Hungerford had to be called by some name other than Hungerford, because he was summoned to Parliament during the lifetime of his father, who was also summoned among the Barons. Ferrers of Groby was a title which had already been used to distinguish the various branches of the Ferrers family in which there were peerages. Percy was summoned during the lifetime of his father, Henry Percy, Earl of Northumberland, and not unnaturally took a distinguishing title. Bouchier, who, two years later, was summoned as Lord Fitz-Warine, had to be distinguished from his brother, who (being also Comte d'Eu) was successively Baron Bouchier, Viscount Bouchier, and Earl of Essex.

¹ *Rot. Lit. Claus.*, 27 Hen. VI, m. 24 d (printed, p. 919).

In other instances also in which there is a summons to Parliament of a Baron 'as in right of his wife,' whether his barony is described by his wife's family name or otherwise, the summons, if not in virtue of the lands held by the wife, indicates a new creation. It is almost impossible to distinguish between the one intention and the other. In either case it cannot be maintained that a Baron really enjoyed his dignity in right of a dignity possessed by his wife, because, according to law, her status as his wife was her only status, and because a new creation by summons would ennoble the blood of the husband and not of the wife. CHAP. VI.

It is nevertheless probable that there were no very precise doctrines on the subject in the reign of Henry VI, and that, as sitting in the House of Peers came to be regarded more and more in the light of a privilege, its original association with land and land-burdens began to be forgotten. Probable want of precise doctrines in the reign of Henry VI.

In the reign of Henry VIII the summons directed to the husband of a woman inheriting a barony appears to have been associated with the idea of tenancy by 'the curtesy of England.' Mr. Wimbish, the husband of Elizabeth daughter and heiress of Gilbert, Baron Talboys, of Kime, claimed the dignity. He had no issue by her, and the King took upon himself to pronounce that 'neither Mr. Wimbish nor none other from henceforth should use the title of his wife's dignity but such as by curtesy of England had also right to her possessions for term of his life.' This was a recognition of the earlier principle, but with a limitation which had not previously existed. In former times the husband was summoned, though he had no issue, as was clearly shown in the cases of Hugh Stafford and Lewis Robsart. Each was summoned as the husband of Elizabeth, heiress of the barony of Bourchier, though both lived and died childless. The acceptance of the new doctrine laid down by Henry VIII was an important step towards the extinction of the older doctrine that the possession of land involved the burden or the privilege of a summons to Parliament. The doctrine as to the 'curtesy of England' laid down by Henry VIII.

CHAPTER VII.

BARONY BY PATENT: BARONY BY WRIT: PRECEDENCE:
ABEYANCE.

CHAP. VII.

Late growth of the doctrine that a writ of summons to Parliament, followed by a sitting, conferred hereditary dignity.

THE doctrine of the creation of an hereditary peerage by the summons of a man to Parliament, without any mention of his heirs, is of far later growth than the early writs of summons by which peerages are said to have been created. It has already been shown that in the reign of Edward I, and for some time afterwards, the number of persons summoned among the Barons varied very widely. This fact in itself is almost sufficient to prove that the idea of the creation of an hereditary barony could not have been in the mind of the sovereign at the time at which the summons issued. We find that men were summoned to one Parliament and not to another; we find that their heirs were sometimes summoned and sometimes not. All this is quite inconsistent with the theory that a single summons to Parliament, followed by a sitting in Parliament, gave a peerage to the person summoned and the heirs of his body. It is not, however, at all inconsistent with the theory that persons holding in chief of the King, as of the Crown, and therefore holding, according to the Constitutions of Clarendon, as by barony, were liable to a summons which might issue or not at the King's pleasure.

Gradual transition from burden to privilege: attendance

The whole of the ideas relating to the creation of a Baron by writ could not have reached maturity until men had forgotten that the summons to Parliament was a burden as inseparable from their lands, as the burden of military service,

or until they had come to regard it as an essential part of their dignity. The transition was very gradual. It was beginning, perhaps, at the time when English Peers first spoke of themselves as Peers of the Realm, in the reign of Edward II. It had, perhaps, made some progress when Richard II created John de Beauchamp (who was Steward of the King's Household) 'one of the Peers and Barons of the Realm . . . willing that he and the heirs male of his body should have the status of Barons, and should be called Lords de Beauchamp and Barons of Kidderminster ¹.'

CHAP. VII.
in Parlia-
ment
obligatory
on the first
Baron
created by
patent in
1387.

The reasons assigned for this creation were the services and personal merits of Beauchamp himself, the nobility and fidelity of the family from which he had sprung, and the position which he was to take in future Councils and Parliaments. Attendance in Parliament in obedience to the King's summons was thus still one of the duties obligatory upon a Baron, though in Beauchamp's case obligatory not in virtue of his lands but in virtue of his dignity. None of his compeers can be shown to have held their baronies on the same terms.

It might perhaps be suspected that as the Staffords and the Greystocks commonly had, unlike the rest of the Barons, a summons directed, '*Baroni de Stafford*' or '*Baroni de Greystock*,' there had been in each of those families a creation of a Baron by Letters Patent never yet brought to light. This conjecture, however, is not only improbable in itself, but is refuted by the fact that, when Beauchamp, Baron of Kidderminster, was himself summoned to Parliament, he was summoned merely as John de Beauchamp, of Kidderminster, while the summons to Greystock was in the form '*Radulfo Baroni de Greystock* ².' The reason for the application of the expression 'Baron' to members of the families de Stafford and de Greystock has never yet been discovered, but it is possible that the word may be only a

The
'Barons' of
Stafford
and Grey-
stock :
'Baron' a
surname.

¹ *Rot. Lit. Pat.*, 11 Ric. II, part i. m. 12 (printed in *Rep. Dig. Peer*, vol. v. p. 81).

² *Rot. Lit. Claus.*, 11 Ric. II, m. 24 d (printed in *Rep. Dig. Peer*, vol. iv. p. 725).

CHAP. VII. part of the surname in each case, and may have no reference to the dignity of a Baron. It is true that early instances of hereditary surnames are extremely rare, and that the Barons of Greystock and Stafford can be traced back to the reign of Edward I. Apart from the question of descent from father to son, however, there is ample evidence that 'Baron' was used merely as a *cognomen* without any reference to status or dignity. As early as the reign of King John, one 'Odardus Baro' was a juror¹, and Roger Baron appears as an essoiner in the reign of Henry III². An exact parallel to the names Baron of Greystock and Baron of Stafford occurs among the sureties for a knight of the shire for the County of Lincoln in the reign of Edward I. One was Robert Baron of Wilesthorpe, and another William Baron of the same place³. None of these, it need hardly be said, were ever summoned to Parliament.

The creation of John de Beauchamp as Lord de Beauchamp, Baron of Kidderminster, and his summons to Parliament simply as John de Beauchamp of Kidderminster are very apt illustrations of the legal doctrine that Baron was not a necessary addition to the name of an individual Lord of Parliament summoned among the Barons. John de Beauchamp's title was Lord de Beauchamp; and the words 'of Kidderminster' were added apparently only to distinguish him from other members of the numerous family of Beauchamp.

Importance
of Lord
Beau-
champ's
creation by
patent in
relation
to the
theory of
barony by
writ.

The Letters Patent by which he was created are, however, of importance in relation to the doctrine of barony by writ of summons. The dignity was limited in a manner different from that which the later lawyers attributed to the ordinary summons of a Baron. This was held to operate in favour of the heirs general of the body of the person receiving the summons, whereas Beauchamp's creation was in favour only of him and the heirs male of his body. Beauchamp was,

¹ Roll of Easter, 11 John (printed, *Plac. Abbr.*, 66 b).

² Roll of 32 Hen. III (printed, *Plac. Abbr.*, 126).

³ Return endorsed on writ to the Sheriff of London, 26 Sep., 28 Ed. I (printed in *Parl. Writs*, i. 97).

however, afterwards summoned in precisely the same terms as the other Barons ; and, if the summons operated in favour of the heirs general in one case, it is not clear why it should not have had the same consequences in another case. The only reason that can be assigned is that the effect of the writ of summons was governed by the Letters Patent ; but the admission of one exception to the ordinary effect of the writ of summons at once suggests the possibility of other exceptions, and the necessity of a very stringent examination of the general rule.

Beauchamp's creation as Lord de Beauchamp is the first undoubted instance of a barony conferred as a dignity apart from any considerations relating to the tenure of land. We do know for certain that his title of honour was conferred as a personal distinction in tail male, but we have no certain knowledge that the dignity of any other Baron was as yet supposed to be merely personal, and, if it was, we have no means of explaining why the inheritance should be to the heirs general by virtue of a summons directed to a particular individual.

With the idea that a summons to Parliament gave dignity to the person summoned, there naturally sprang up the idea that there were degrees of precedence among those who sat in the same House. When the only temporal Lords were Earls and Barons, the writs of summons to the Earls were always placed on the roll before the writs of summons to Barons, but there does not seem to have been any definite rule with regard to the order in which the writs of summons to the Barons were entered. The creation of Dukes and Marquesses, however, who took precedence of Earls, and the creation of a Viscount who took precedence of Barons, must almost of necessity have suggested questions concerning the precedence of Barons among themselves.

Ideas of precedence grew up with the idea that summons to Parliament was an honour rather than a burden.

There is extant a treatise on the mode of holding Parliament, which, if of no authority in relation to the times immediately following the Conquest, must, at any rate, possess some value in relation to the period at which it was written. In its earliest form it appears to have been

Places of the Lords of the several degrees in Parliament in the

CHAP. VII. composed about the beginning of the fourteenth century, but there are later copies of it which show important variations. The Earls and Barons are mentioned as persons having lands and rents to the value of an entire earldom or an entire barony, and they, it is said, ought to be summoned and to come to Parliament. The place of the Lords Spiritual in Parliament is described in the earliest copies, but not the place of the Lords Temporal. 'The King shall sit in the middle of the Greater Bench,' on his right the Archbishop of Canterbury, on his left the Archbishop of York, and behind them the Bishops, Abbots, and Priors. Below the King and to his right were to sit the Chancellor, the Chief Justice of England and his companions (the puisne Judges of the King's Bench) 'and their clerks who were of the Parliament.' Below the King and to his left were to sit the Treasurer, the Chamberlain, the Barons of the Exchequer, the Justices of the Common Bench, and their clerks who were of the Parliament ¹.

In later copies (which, however, must refer to a period before the creation of Dukes, Marquesses, and Viscounts, as they are not mentioned) a somewhat different account is given of the Lords Spiritual and a place is assigned to the Lords Temporal. On the King's right were to sit the Archbishop of Canterbury, and the Bishops of London and Winchester, and behind them the other Bishops, Abbots, and Priors. On his left were to sit the Archbishop of York, and the Bishops of Durham and Carlisle, and behind them, in rows or in succession ², the Earls, Barons, and Lords, 'such division being always observed ³.'

No precedence among Barons as yet indicated.

The passage is unfortunately vague, but it does not necessarily indicate any order of precedence among the Barons. It rather shows that the Lords Spiritual were to be kept distinct from the Lords Temporal, and the Earls from the Barons. It might, perhaps, even be inferred that there were Lords who were Peers and inferior to the Barons,

¹ *Modus tenendi Parliamentum* (ed. T. D. Hardy), p. 37.

² *Seriatim*.

³ *Modus tenendi Parliamentum* (ed. T. D. Hardy), p. 37.

and that they also were to have a distinct place assigned to them. As, however, Baron was not a necessary addition, it is more probable that the 'Barons and Lords' were only the Barons who were Lords, and the Lords who were Barons, just as we find in the two first creations of Barons by patent that each of them was to have the status of Baron, and to be called a Lord¹. Verbiage and grandiloquence have always flourished in the warm and sunny regions of the peerage; and from a very early time the nobles were called *Proceres et Magnates*, though the term *Proceres* by itself or the term *Magnates* by itself would have been quite sufficient to designate them. CHAP. VII.

Thus far there is no certain sign that one Baron could claim precedence over another. It was not until the reign of Henry VI, that the first Viscount was created (John de Beaumont, Viscount Beaumont)², and it was not until the same reign that questions of precedence came into prominence. In Viscount Beaumont's patent it was expressly stated that he was to have a place in Parliaments, Councils, and other assemblies above all the Barons of the Realm. This appears to be the first instance in which precedence in Parliament was thought of sufficient importance to be mentioned in the patent of creation. The earliest Dukes—the first Dukes of Cornwall and of Lancaster—being of royal blood, had precedence of the Earls, as a matter of course, though the point was not touched in their patents. The first Marquess, Robert de Vere, had a charter³ in which no mention was made of precedence in

Creation of the first Viscount by Henry VI: questions of precedence come into prominence: Dukes and Marquesses.

¹ It might, of course, be argued that Lords, other than Earls and Barons, are the bannerets, of whom there is occasional mention in the Rolls of Parliament. The word 'banneret,' however, occurs on so few occasions that it is difficult to arrive at any satisfactory generalization. It is possible that they may have been summoned when special advice was required on special subjects. See *Rot. Parl.*, 18 Ed. III, no. 6 (printed, vol. ii. p. 147), 46 Ed. III, no. 7 (printed, vol. ii. p. 309), &c.

² *Rot. Lit. Pat.*, 18 Hen. VI, part ii. m. 21 (printed in *Rep. Dig. Peer*, vol. v. p. 235).

³ *Rot. Chart.*, 9 & 10 Ric. II, m. 13 (printed in *Rep. Dig. Peer*, vol. v. p. 78).

CHAP. VII. Parliament, though the King directed that he should have place below the Dukes and above the Earls¹. The charter was cancelled almost immediately afterwards, and Robert de Vere was created Duke of Ireland².

The doctrine of hereditary barony by writ was now becoming possible.

The more men struggled, however, for precedence as Peers, the more they forgot the old idea that the summons to Parliament was a burden. The legal doctrine that the summons followed by a sitting was equivalent to the creation of a Peer with inheritance to the heirs of his body was now becoming a possibility. It was not a possibility so long as attendance in Parliament was considered only an irksome duty; it was not a possibility in the reign of Edward I, to which the lawyers of a later time have traced back the origin of many so-called baronies by writ. It grew out of the prescription in accordance with which the representatives of the same families were called to Parliament, generation after generation.

The doctrine not clearly established in the reign of Henry VI: sometimes confused with the doctrine of abeyance: the barony of St. Amand.

Even as late as the reign of Henry VI, it is by no means clear that the writ of summons to an ancestor was held to give a peerage to the descendant. This theory has been unfortunately somewhat intermixed with the theory that in cases in which the descent was to co-heiresses the peerage fell into abeyance, but could be called out of abeyance by the Crown. Aymer de St. Amand had been summoned to Parliament in the reign of Edward I. His lands descended to his brother John, who was also summoned to Parliament, as were successively John's son Aymer, and Aymer's son Aymer. The last Aymer died in 1403. He had no male issue, but two daughters, one by his first wife, one by his second. It does not appear that there was any summons to Parliament of any Lord St. Amand between the time of Aymer's death and the summons of the husband of his elder daughter's granddaughter in 1449. It is commonly said that the barony was in abeyance, and so, according to modern ideas, it

¹ *Rot. Parl.*, 9 Ric. II, no. 17 (printed, vol. iii. p. 210).

² *Rot. Chart.*, 10 Ric. II, no. 2 (printed in *Rep. Dig. Peer*, vol. v. p. 79).

may have been until the death of the younger daughter, CHAP. VII.
in or before the year 1426. Upon her death without issue, however, the abeyance must, according to modern ideas, have ceased, and no act of the Crown was necessary to terminate it. There is consequently nothing to show that when William de Beauchamp, the husband, was summoned among the Barons to Parliament as 'Lord de St. Amand¹,' he was not summoned merely to perform a service incident to the lands which had become the right of his wife, or that he was not summoned in virtue of a new creation. The doctrine that a mere summons to Parliament, followed by a sitting, conferred a descendible dignity cannot be proved from this and similar cases to have as yet come to maturity.

When the power of the Crown had been weakened by the incapacity of the King, and by disputes touching the succession, the power of the Baronage as a whole was increased, and each individual member of it was more disposed than before to assert his own dignity. The King, however, was still the fountain of honour, and the Baron who wished to obtain precedence above his fellow Barons could attain his end only with the King's assistance. Among the Peers of ranks higher than that of Baron, Henry VI assumed, if in fact he had not, the power of giving precedence without regard to priority of creation. To Henry Beauchamp, Earl of Warwick, he gave, by charter, precedence over all other Earls². When the Earl was created Duke, three days later, his position was assigned as next to that of the Duke of Norfolk, and before that of the Duke of Buckingham³. The Duke of Exeter, who had been recently created, was given precedence by patent next to the Duke of York⁴. The Duke of Buckingham

Power assumed by Henry VI of giving precedence in ranks above that of Baron.

¹ *Rot. Lit. Claus.*, 27 Hen. VI, m. 24 d (printed in *Rep. Dig. Peer*, vol. iv. p. 919).

² *Rot. Chart.*, 22 Hen. VI, no. 35 (printed in *Rep. Dig. Peer*, vol. v. p. 242).

³ *Ib.*, 21-24 Hen. VI, no. 24 (printed, p. 244).

⁴ *Rot. Lit. Pat.*, 22 Hen. VI, part i. m. 13 (printed, p. 248).

CHAP. VII. shortly afterwards obtained a charter to the effect that, except in the case of descendants of Henry VI or his successors, no Dukes subsequently created should have precedence of him or his heirs¹.

When civil war is actually existing or impending the laws are apt to be strained, if not broken, and it has often been remarked that statements made or acts done in the reign of Henry VI should not be regarded as evidence of settled principles. It must, however, be remembered, on the other hand, that times of absolute tranquillity in England had always been rare. Since the granting of Magna Charta the only two Kings who had sat firmly on their thrones for any considerable length of time were Edward I and Edward III. The constitution had grown up amidst wars and rumours of wars. The events which actually occurred in the reign of Henry VI are as much a part of history, and of constitutional history, as the events of any other reign. The statements relating to the past which were then made are of no value if at variance with the contemporary documents of the earlier time.

Creation of
a Baron
to hold to
him and
his heirs
being lords
of the
manor of
Kingston
Lisle.

We know from records of the time of Henry VI, that the Crown assumed in certain cases the power of giving grants of precedence, and that the assumption passed without dispute. We know, on the other hand, that many statements were made which it may seem difficult to reconcile with documents of higher authority. Thus when John Talbot was created Lord and Baron Lisle by Henry VI, we know from the charter itself² that the creation was to him and his heirs being lords of the manor and lordship of Kingston Lisle. We know, further, that he held the manor and lordship in fee, by conveyance from his father, the Earl of Shrewsbury, and his mother, Margaret, one of the coheirs of Elizabeth, daughter and heir of Margaret the daughter of Warine the last Lord Lisle. His mother Margaret, the wife of the Earl of Shrewsbury,

The tenure
of the
manor.

¹ *Rot. Chart.*, 25 & 26 Hen. VI, no. 31 (printed, p. 257).

² *Ib.*, 21-24 Hen. VI, no. 23 (printed, pp. 244-246).

had held the manor and lordship of Kingston Lisle in virtue of a partition of lands made between her and her sisters and coheirs. The conveyance made to John Talbot was 'to hold of the chief lords of the fee by the services due and of right accustomed.' The condition on which he and his heirs were to be Barons and Lords Lisle was therefore that of holding the lordship and manor of Kingston, and not of holding it in chief of the King. This was a creation of a very remarkable character, but there is no doubt whatever that it was actually made, and no reason to doubt that the King had the right to make it. CHAP. VII.

When a history of the barony of Kingston Lisle, as existing before the new creation, is set forth in the charter, it becomes open to criticism on historical principles. Warine, Lord Lisle, it is asserted, and all his ancestors, from time immemorial, had had the name and dignity of Baron and Lord Lisle, in right of the manor and lordship of Kingston Lisle. The alleged terms of the conveyance of the manor to John Talbot show that the tenure of the manor was not supposed to be of the King in chief, as of the Crown. The barony, therefore, was, according to the charter, not a barony by tenure in the ordinary sense, but a barony by tenure of an exceptional character – a barony inherent in the blood of a particular family holding a particular manor of any person whatsoever. Much labour has been expended with the object of showing that the manor of Kingston Lisle was not in fact held directly of the Crown by the family of Lisle, and that the barony of Lisle was therefore never in fact a barony by tenure¹. As, however, it is nowhere stated in the charter that the manor was held of the King, but the contrary is implied in the document itself, the evidence that the Lisles held of a 'mesne' (or intermediate) Lord, however interesting from a genealogical and antiquarian point of view, does not in any way invalidate the statements made in the instrument. The real question at issue

Recitals in the charter: the new creation made to remove doubts respecting the ancient barony of Kingston Lisle.

¹ *Third Rep. Dig. Peer*, vol. ii. pp. 199–208.

CHAP. VII. is whether one holding of a mesne Lord could be a Baron by virtue of his tenure of particular lands. That question is answered in the affirmative in the charter, but with full recognition of the fact that there were doubts and scruples on the point. The outcome is, therefore, that no barony by tenure of a mesne Lord has ever been recognized in the person of the possessor except in this one case. In this case, too a new creation was made in order to meet the objections of those who did not assent to the principle, for which the Constitutions of Clarendon, at any rate, afford no warrant.

It is, perhaps, reasonable to infer that the doctrine of barony by tenure was still so familiar, that even long tenure of a mesne Lord was, in one instance at any rate, supposed to be evidence of a right to a barony of a particular designation. It is not, however, impossible that the persons now styled Barons and Lords Lisle were in previous times tenants in chief of other lands, though they held the manor of Kingston Lisle of a mesne Lord. It was probably to end this, among other doubts and difficulties, that the new creation was made.

No definite order of precedence mentioned in this charter, or as yet indicated elsewhere.

Though, as we have seen, the Crown interfered in many instances with regard to the precedence of Earls and Dukes, yet neither in this case nor in relation to other baronies is any precedence of one Baron over another mentioned in the reign of Henry VI. John Talbot, Bar^{on} and Lord Lisle was to have his seat in Parliaments and Councils 'amongst the other Barons of the Realm,' just as Warine and his predecessors had had it, but no attempt is made to define the exact position. It is probable enough that 'ancienty' may have determined, at this time, the relative position of the Barons, but, if so, it is quite clear that the first writ of summons to Parliament could not have been the one determining test of ancienty. Whatever the precedence of any previous Lord Lisle may have been, he must have held it on some ground different from that of the date of a summons; and the only reasonable conclusion is either that there was not as yet any definite rule

of precedence between Barons, or that, if there was, it depended on some principle not yet ascertained. CHAP. VII.

In the reign of Henry VIII the precedence of Barons (as well as of Peers of other ranks) according to their 'ancienty' was recognized by Act of Parliament¹ (the consent of the King, however, being given only as an act of grace), but no definition or explanation of 'ancienty' was set forth. In many cases probably a Baron of one family had allowed precedence to a Baron of another family, for many generations, without thought or question of the original right, and for no other reason than that his father had done likewise. It was only when a dispute arose and was settled, and when the decision was recorded, that any principle could be said to be established.

Precedence of Barons according to 'ancienty' recognized in the reign of Henry VIII, but without explanation.

The earliest case in which an express decision was given appears to be that of Thomas son of William West, Lord De la Warr, which occurred in the thirty-ninth year of the reign of Elizabeth². His great grandfather Thomas, who had been summoned to Parliament in the third year of Henry VIII, had by a first wife a son Thomas, a younger son who died without issue, and four daughters. By a second wife he had three sons, Owen, George, and Leonard. After his death, which occurred in February, 1525-6³; his eldest son Thomas was summoned to Parliament. This Thomas also died without issue in the year 1554. His eldest brother of the half-blood, Owen, had already died in the year 1551³, leaving two daughters but no male issue. His second brother of the half-blood, George, had also died in the year 1538³, leaving issue, William and

The De la Warr case in the reign of Elizabeth, the first in which an express decision was given: its origin.

¹ Stat. 31 Hen. VIII, cap. 10.

² There is in the *Third Rep. Dig. Peer* (vol. ii. pp. 142-145) a long but inconclusive disquisition on the barony of La Warr and the precedence supposed to attach to it before it was enjoyed by the family of West, but no reference is made to the later and very remarkable details set forth below.

³ These dates are given in Collins's *Peerage*, vol. v. pp. 12-17, as founded on the probates of the respective wills, and so far as they are material, are confirmed by the documents mentioned below.

CHAP. VII. another son. Leonard also had issue both male and female.

In the time of the first mentioned Thomas, Lord Lawarre, or De la Warr, the greater part of his lands had been settled on his son Thomas in tail male, with successive remainders in tail male to his three other sons, Owen, George, and Leonard. Upon the death of the second Thomas, without issue, the lands would, in the absence of any settlement, have descended to his sisters of the whole blood, or their representatives, to the exclusion of his half brothers. After the death of George, however, in 1538, and of Owen in 1551, George's son William became the heir in tail male according to the terms of the settlement.

William West, heir in tail male to the lands of the barony, disabled for life, by Act of Parliament, in the reign of Edward VI.

William, being then a very young man, and being anxious to expedite his succession to the inheritance, mixed some poison in a cup with drink for his uncle Thomas, but had the misfortune, or the good fortune, to be detected before it was administered. Upon complaint made in Parliament by his uncle an Act was passed by which William was disabled for life from claiming or enjoying 'any dignity or lordship, in any right or estate by descent, remainder, or otherwise ¹.'

Attainted for high treason in the reign of Queen Mary.

In the troubled times which ensued during the reign of Queen Mary, William suffered attainder for high treason, and this further complicated the position. He was, however, in favour with Queen Elizabeth, and at the beginning of her reign we find him corresponding with Secretary Cecil in relation to his affairs. His statement can, perhaps, best be given in the words of his letter to Cecil of March 19, 1558-1559 :—

¹ 11 Rep. 1. The title of the Act is given among the 'Private Acts' of 3 & 4 Edward VI in the Statutes at large, but it was in fact never certified into the Chancery, and does not appear on the Parliament Roll either of 2 & 3 or of 3 & 4 Edward VI. Its validity, however, was never questioned, and it is mentioned in the Calendar of Acts passed in the Session in the *Lords' Journals* of 3 Edward VI (vol. i. p. 389).

‘May it please you to understand that where your pleasure is to know what lands I have in possession and in reversion and who be my heirs, you shall perceive that my late uncle had licence by Act of Parliament to dispose his lands at his will and pleasure during my natural life, who in his last will gave unto me yearly during my life £350 in annuity, with the manors of Offington and Ewhurst and the parks to the same appertaining, with a house in London, being together of the value of £132 by the year. The residue of his manors, lands, and tenements he willed to his executors to be and go to the performance of his last will and testament during my life, and after my decease the whole to remain to my son according to the remainder in the said Act expressed, who cannot receive the same unless it might please the Queen’s Majesty of her mere goodness to restore me and my children in blood by Act of Parliament. And if he be not restored it comes by the said Act to my brother and to his heirs males lawfully coming, and for want of such issue to my uncle [Leonard] West and his heirs male lawfully begotten, who by reason of my said attainder are my next heirs. And also my living before expressed by meane of my attainder came unto the Queen’s hands that dead is. And in the time of my trouble Her Majesty gave unto my wife for the relief of her and her children one hundred marks yearly out of the Exchequer, and did let to farm to my said wife the said manors of Offington and Ewhurst with the house in London, paying yearly the said sum of £132 for the same, which grant was but during the Queen’s pleasure, and now by her death frustrate and void. So that is all the land I have in possession, paying for it yearly yet the foresaid sum. The rest of my uncle’s lands that went to the performance of his will do yet remain to that use, the doing whereof the executors presently after my uncle’s death, by earnest request, resigned over to me, finding them two sureties which be bound for me to save and keep them harmless, and yearly to yield unto them a true and a just account of my doings in that behalf, the which

CHAP. VII.

Explains
his position
to Cecil
on the
accession of
Elizabeth.

CHAP. VII. estate I assigned over to my sureties for their safety immediately upon the receiving of it out of the executors' hands, the same yet resting with them for that my uncle's will is not fully performed. And after the performance thereof the profits of the said lands yearly to be by the said executors equally divided to my uncle's kinsfolk at the discretion of the said executors. And thus, good Mr. Secretary, is both the whole state of my living and the order of my uncle's will. Beseeching you for that my special trust is in you so to stand my good Master in my cause to the Queen's Highness, that I may be able the better to serve Her Majesty and have just cause (as I have already) to pray for you, life enduring. From my poor house the 19th of March.

Yours always to command,

WYLLIAM WEST¹.

Restored
in blood
by Act of
Parlia-
ment, but
his life
disability
as to
inheritance
not
removed.

William's application was successful, and an Act was passed for his restitution in blood in the fifth year of Elizabeth². The attainder for high treason in the reign of Mary is recited, but no reference is made to the Act of Edward VI by which William West was disabled. He is described as the eldest son of Sir George West, Knight, whom we know to have been dead from William's letter. Sir George is described as 'son and next heir male unto the Right Honourable Sir Thomas West, Knight, deceased, late Lord Lawarre, father unto the Right Honourable Sir Thomas West, Knight, late Lord Lawarre, also deceased²'.

The barony
of De la
Warr was
in abey-
ance
according
to modern
ideas,
but the
doctrine of
abeyance

Upon the death of the second Thomas Lord De la Warr (of those above mentioned) it must now be asked what became of the dignity? According to the legal doctrines of a later period it would appear to have fallen into abeyance between the daughters of Thomas's eldest half-brother Owen. If it did not so fall into abeyance, it must either have followed the lands or have reverted to

¹ *State Papers, Domestic*, Eliz., 1559, vol. iii.

² *Rot. Parl.*, 5 Eliz., no. 38.

the Crown, and have been at the absolute disposition of the Sovereign. When the De la Warr case was argued, it was already becoming an accepted doctrine that the descent of the dignity of Baron differed from the descent of lands held in fee simple. When lands were so held, and the holders died without issue, leaving sisters of the whole-blood, and a brother of the half-blood, the sisters inherited to the exclusion of the half-brother. 'Of dignities,' however, 'whereof no other possession can be had but such as descend to a man and his heirs, there can be no possession of the brother to make the sister to inherit, but the younger brother being heir to the father shall inherit the dignity inherent to the blood, as heir to him that was first created noble ¹.' It seems to follow that the daughters of the first mentioned Thomas, sisters of the whole-blood to the second Thomas, had no claim to the dignity, though in the absence of a settlement they would have inherited the lands. It is, however, clear from subsequent events not only that no title to the barony was supposed to exist in them or their representatives, but also that no such title was supposed to exist in the daughters and coheirs of Owen, who would, if living, have succeeded to the dignity as heir.

Nine years after his restitution in blood, William was summoned to Parliament as Lord De la Warr ². This was regarded as a new creation, and William took his seat in the House of Lords as a puisne Baron ³. As, however, the designation of De la Warr was accorded to him, it must certainly have been supposed that no right to it existed anywhere if not in him and his heirs.

William West summoned to Parliament as Lord De la Warr: a new creation.

William died leaving a son Thomas who was under no

¹ *Co. Litt.*, 15 b. Some doubts on the subject appear to have been entertained as late as the year 1641. It was ordered by the House of Lords that the Judges should deliver their opinions on the point; and they delivered their unanimous opinion that there could not be a '*Possessio fratris*, in point of honour.' *Journals of the House of Lords*, 29 Jan. and 1 Feb. 1640-1641 (vol. iv. pp. 147, 149-150).

² Dugdale, *Summons to Parliament*, p. 526 (14 Eliz.).

³ 11 Rep. 1.

CHAP. VII. disability of any kind. He was free from all corruption of blood by virtue of the Act of the fifth year of Elizabeth. The disability by which his father was affected through the Act of Edward VI was for life only, and in no way affected himself. He was summoned to Parliament as Lord de la Warr, and it is clear from subsequent events that the summons to his father was held to be the creation of a heritable dignity. It is clear also that this was generally considered good law in the time of Elizabeth, as it finds its place in Coke's Institutes, though not in the great work of Littleton who lived in the reign of Edward IV. 'When a man is called to the Upper House of Parliament by writ,' said Coke, 'he is a Baron and hath inheritance therein¹.' If a man be 'called by writ to the Parliament he hath a *fee simple* in the barony without any words of inheritance.' 'This writ hath no operation or effect until he sit in Parliament, and thereby his blood is ennobled to him and *his heirs lineal*, and thereupon a Baron is called a Peer of Parliament².'

A summons at this time held to create an hereditary peerage: the views of Sir Edward Coke.

It will be observed that there is a very curious contradiction in Coke's own words a contradiction which is of special importance as he was the counsel of Thomas, son of William, Lord De la Warr, in a successful claim of precedence³. It is obvious that, if a man's blood was ennobled only to him and his heirs lineal, he had not a fee simple in the dignity, and these very loose expressions, when used by a great lawyer, go far to show that the law, as it subsequently existed, had not yet been quite clearly defined. Coke's own view, indeed, that the *possessio fratris* did not apply to the descent of a dignity is only a statement in another form, that in a dignity there was no fee simple.

The claim of Thomas, son of William Lord De la Warr,

¹ Co. Litt., 9 b.

² Co. Litt., 16 b. This was, of course, law in Coke's time, but a reference which he gives in support shows clearly that it was not law in the latter part of the reign of Edward III.

³ 11 Rep. 3.

was embodied in a petition to Queen Elizabeth, in which he prayed to have the same place in Parliament as his great grandfather, Thomas, between the Lord Willoughby de Eresby and the Lord Berkeley. The petition was referred by her to the House of Lords. A committee was then named. The committee had the assistance of the Chief Justice of England, the Chief Justice of the Court of Common Pleas, and other Judges, and, as has already been mentioned, Coke was counsel for Lord De la Warr, and won the case. It was objected, in the first place, that the disability of William by virtue of the Act of Edward VI, prevented the descent to his son Thomas of the dignity enjoyed by William's grandfather. As, however, it was distinctly expressed in the Act that William's disability was personal and for life only, the Judges held that Thomas might claim as heir to him or to any of his ancestors. It was objected, in the second place, that William had accepted a new creation from the Queen, and that the new dignity had descended to his son Thomas, and could not be waived. The Judges held that on William's death both the dignity enjoyed by his grandfather and the new dignity conferred upon himself descended to his son Thomas. The Committee reported accordingly to the House of Lords, and the House of Lords to the Queen. In the end 'the Lord De la Warr in his Parliament robes was by the Lord Zouche (supplying the place of the Lord Willoughby then within age), and the Lord Berkeley, also in their robes, brought into the House and placed in his said place . . . Garter King of Arms attending upon them and doing his office ¹.'

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Thomas, the son of William, held to have inherited the older barony with precedence, as well as the new dignity.

No more solemn recognition of Lord De la Warr's right could have been made; yet it is not manifest on what principle the precedence was allowed. It is perfectly clear that the summons of William followed by a sitting in Parliament, was held to create an hereditary peerage, The old idea of barony by tenure apparently not yet extinct.

¹ *Journals of the House of Lords*, 14 Nov. 1597 (vol. ii. p. 197), and 11 Rep. 1-3.

CHAP. VII. although he could not, in consequence of his disability, have had any lands in barony. The grounds on which it was held that his son had the barony of his grandfather can only be conjectured.

According to more recent doctrines the barony enjoyed by the first Thomas was in abeyance, and the third Thomas (of those above mentioned) had no right to it. According to the alternative theory (sometimes advanced) that a barony descending to coheirs lapsed to the Crown, the third Thomas had still no right to it, and the new creation in favour of his father gave him his only claim to be a Baron. If, again, an old barony, revived after reversion to the Crown, carried the ancient precedence, William himself would have had it, notwithstanding his disability to inherit; and his son's petition would have been unnecessary. The only clue that we have to the thoughts which passed through the minds of the Judges and of Coke is to be found in the references which Coke, in his commentaries on Littleton, gives in relation to the subject; and the only reference of importance is to the report of the forty-eighth year of Edward III already noticed¹. In that report, tenure by barony is distinctly shown to be essential in the case of any one claiming privilege as a Baron. It would therefore seem to follow that in relation to an ancient barony, or barony by prescription, as distinguished from one newly created, the lawyers had not even yet shaken themselves free from the doctrine of barony by tenure. Thomas, son of William, Lord De la Warr, held the lands of his ancestors, and it is extremely difficult to see any other reason for assigning to him the precedence which his ancestors had enjoyed. It may, perhaps, be objected that he did not hold the lands in barony—that he did not hold them in chief, as of the Crown. This is true, in a sense, because tenant-in-tail held in theory of the donor or his heirs, and not of the Crown directly. When, however, the donor was dead, and

¹ *Year Book*, Mich., 48 Ed. III, fo. 30, no. 18.

the coheirs were incapable of sitting in Parliament, it does not seem unreasonable that the tenant-in-tail male, being of the blood of the original tenant-in-chief, should enjoy the dignity and privileges and perform the services attaching to the lands. CHAP. VII.

There is yet another point in relation to this case of Lord De la Warr which seems worth attention. It is said in the Journals of the House of Lords, that the place of Thomas, Lord De la Warr, the grandfather of William, appears by record¹. The question which naturally arises is: what record? Coke tells us that when issue was joined in any action, whether a person was a Baron or not, it could not be tried by a jury, but must be tried 'by the record of Parliament, which could not appear unless he were of the Parliament².' The 'record of Parliament' might at first sight appear to be in early times the Rolls showing the proceedings in Parliament, in later times the Journals of the House of Lords. It is not, however, quite clear from Coke's Reports in what sense he, at any rate, used the expression. If persons 'be Lords of Parliament,' he says, 'it appears by record and therefore by record, viz. by the King's writ it ought to be certified³.' Elsewhere he uses language which also lacks precision: 'If a Baron, Viscount, Earl, or other Lord of Parliament, and Peer of the Realm be plaintiff in any action, and the defendant will plead that the plaintiff is not a Baron, Viscount, Earl, &c., this . . . shall be tried by the record in Chancery which imports by itself solid truth⁴.'

The place of Lord De la Warr in Parliament appeared 'by record': question as to the nature of the record.

The Chancery was regarded as an office of the Parliament, and, before the Journals of the House of Lords began to be kept in a separate form, in the reign of Henry VIII, the record in Chancery might have been interpreted to mean either the Roll of Parliament, or the

The Rolls of Letters Close, the Rolls of Parliament, and the Journals of

¹ *Journals of the House of Lords*, 14 Nov. 1597 (vol. ii. p. 196).

² Co. Litt., 16 b.

³ 6 Rep. 53, the Countess of Rutland's case in the Star Chamber, Mich., 3 James I.

⁴ 12 Rep. 96, the Countess of Shrewsbury's case, 10 James I.

CHAP. VII. Roll of Letters Close, on which the writs of summons to the House of Lords, Parliament were enrolled. After that time, the Rolls of Parliament began to be merely enrolments of Acts of Parliament without any account of the proceedings. In relation to individual Peers, therefore, it might seem that in Coke's time the record in Chancery could have been only the Roll of Letters Close. It must, however, be remembered that, when he wrote, the change in the character of the Parliament Rolls was comparatively recent. A writ of summons enrolled on the Close Roll affords no evidence of a sitting in the House of Lords, as do sometimes the earlier Rolls of Parliament; and Coke himself says, 'this writ hath no operation or effect until "the person summoned" sit in Parliament.' It would, therefore, seem erroneous to suppose that the record by which the issue could be tried is the Roll of Letters Close alone, though this appears to be the view taken of Coke's words in some of the text books¹.

A far more precise and intelligible statement of the law was made in later times. When a party in a cause claims to be a Peer by patent the claim is triable by the patent itself; when by descent or prescription, the claim is triable by a jury; when by writ 'he is not a Peer until he has taken his seat: that is to be tried by the record of Parliament².' That which has to be tried, therefore, is clearly not whether he was summoned, but whether he sat.

Proofs of precedence of Barons: practically none before the reign of Henry VIII.

It seems to follow that the record to which reference is made in the Journals of the House of Lords of the year 1597, in relation to Lord De la Warr, is either the Parliament Roll or the earlier journals of the House. As Thomas, Lord De la Warr, the grandfather of William was living when the journals of the House had begun to show the sittings in order of precedence, there can be little doubt that the place of Thomas in Parliament was that which was assigned to him in the Journals of the Lords.

¹ E.g. Hubback, *Evidence of Succession*.

² 2 Barn. and Cres. 871-875.

This fact, however, brings us to a very important conclusion with regard to the precedence of Barons. The Journals of the Lords commence only in the reign of Henry VIII, and the first day on which the names of those present are set down in order is February 6, in the third year of the reign. It would, therefore, seem to be impossible to prove the precedence of a Baron as existing in earlier times, and no question of precedence of Barons appears in fact to have been expressly decided before that date.

It was, of course, well understood that Dukes had precedence of Marquesses, Marquesses of Earls, Earls of Viscounts, and Viscounts of Barons; but the creations of Dukes, Marquesses, Earls and Viscounts were by solemn investiture, by charter, or by letters patent. The Barons, however, were in a different position. It is, without doubt, possible to show from the Rolls of Letters Close that the ancestor of one Baron had an enrolled summons to Parliament before the ancestor of another, but this is not necessarily a proof of precedence in all cases, though it is commonly accepted as sufficient. The names of the Barons do not always appear in the same order on those Rolls, and it is sometimes possible to show that a Baron sat in a Parliament when the Roll fails to show his summons.

The case of Thomas, son of William Lord De la Warr, is thus in many ways a landmark in the history of the peerage. It is one of the most striking cases in which a claim of precedence on the part of a Baron was settled; it is, perhaps, the first case in which a mere summons to Parliament, followed by a sitting, was held to confer an hereditary dignity; and it is closely associated with Sir Edward Coke, whose statements concerning the law on this subject appear to have been the ground of subsequent decisions.

Special importance of the De la Warr case.

The tree of the later law on barony by writ was now planted and destined to bear fruit in future reigns. Some time, however, was yet to elapse before the doctrine of barony by tenure was declared to be no longer in force,

Barony by tenure declared to be no longer in

CHAP. VII. and even before the doctrine of hereditary peerage by writ
 existence was finally accepted as a principle. In the year 1669,
 in 1669. when Benjamin Mildmay was claiming the barony of
 Fitz-Walter in opposition to Robert Cheeke, there was
 a discussion on the subject in the Privy Council, before
 which the matter was brought by order of the King. Then
 barony by tenure 'was found to have been discontinued
 for many ages, and not in being, and so not fit to be
 revived, or to admit any pretence of right to succession
 thereupon¹.' The Council had the assistance of Sir John
 Kelyng, Chief Justice of England; Sir John Vaughan,
 Chief Justice of the Common Pleas; Sir Matthew Hale,
 Chief Baron of the Exchequer; the King's Chief Serjeant-
 at-Law, and the Attorney and Solicitor-General. The
 opinion has, therefore, the highest legal authority of the
 time, and we may feel sure that a few years after the
 restoration of Charles II, the only recognized roots of
 title to a barony were writ of summons to Parliament, and
 creation by letters patent or charter.

This most important Order in Council, however, is for
 many reasons of little value in relation to earlier times.
 The words 'many ages' are too vague to be of any practical
 use in history. There had been two great revolutions
 in less than a quarter of a century, and the events of the
 earlier part of the reign of Charles I may well have
 seemed ages apart from the events which occurred after
 the Restoration. The whole theory of tenure had also
 been changed. Tenure by military service had been swept
 away by the men of the Commonwealth; and the men
 of the Restoration had followed their example. When
 tenure by military service was gone, barony by tenure
 had become an anachronism, and the opinions of Kelyng,
 Vaughan, and Hale were only the natural expression of
 the sentiments of the time. From the historical point of
 view the most remarkable fact is that there is no judicial

¹ Order in Council, 19 Jan. 1669, Privy Council Office (printed in
Rep. Dig. Peer, vol. iv. app. iv. p. 1008).

decision adverse to barony by tenure, until a statute had put an end to tenure by barony¹. CHAP. VII.

In the year 1674 the judges expressed an opinion that Gervase Clifton (who was summoned to Parliament in the sixth year of the reign of James I), was by virtue of the writ of summons and sitting in Parliament 'a Peer and Baron of this kingdom, and his blood thereby ennobled,' and that 'his honour descended from him to Katharine, his sole daughter and heir, and successively after several descents to the petitioner' who was his great granddaughter. The House of Lords thereupon resolved 'that the claimant (Katharine O'Brien) had right to the barony of Clifton².' Even this was rather a decision upon a particular case than the enunciation of a general principle. It appears, however, to have been a sufficient precedent for all subsequent cases in which the circumstances were the same, but to have left open the question of the period at which a summons to Parliament followed by a sitting first operated to create an hereditary barony.

Hereditary barony by writ more fully recognized in 1674.

The doctrine that a barony may be in abeyance, for an indefinite time, between coheirs or their representatives does not appear to have arrived at maturity when Sir Edward Coke wrote his *Institutes*. He had an idea that the King might confer the dignity upon any daughter of an Earl or Baron who might be one of the coheirs³, but he does not distinctly affirm that the King might not confer it on a stranger in blood. He does not use the word abeyance in relation to this subject, and he does not say that when there are two or more coheirs, and one alone, or a representative of one alone survives, the

The doctrine of abeyance had not arrived at maturity in Coke's time.

¹ The question was raised again as late as 1861, in the Berkeley Peerage case, when, after reference to them by the Crown, the Lords held that a writ of summons to Parliament could not be claimed on the ground of holding certain lands.

² *Journals of the House of Lords*, 7 Feb. 1673-1674 (vol. xii. pp. 629-630).

³ *Co. Litt.*, 165 a. The case which he cites has been mentioned, and its effect described above, p. 91.

CHAP. VII. one or the representative of the one becomes entitled to the dignity. It is therefore necessary to seek in some more recent period for the full development of the idea.

Case of
the Earl of
Oxford :
a barony
descending
to co-heirs
held to be
absolutely
at the
disposal
of the
Sovereign
in the
reign of
Charles I.

A little later—at the beginning of the reign of Charles I—the doctrine had not made further progress. A very important case was then decided with regard to the earldom of Oxford, and the baronies of Bolbecke, Sandford, and Badlesmere. In the sixteenth year of the reign of Richard II, the earldom had by Act of Parliament been conferred in tail male upon Aubrey de Vere, after the attainder of his nephew Robert in the eleventh year. From this Aubrey the earldom descended, according to the limitation, to another Robert de Vere, who was held to be the rightful heir in the year 1626. The baronies, however, not being included in the entail, descended, in a different manner, to the heirs general. Aubrey had a son Richard who had two sons, John and Robert. John had a son John, who had issue a son John, and three daughters, Dorothy, Elizabeth, and Ursula. The last mentioned John succeeded, in his turn, to the earldom, but died without issue. The earldom then fell, according to the limitation, to the male heir of Richard's son Robert, as was reported to the House of Lords by the Lord Chief Justice of England, on behalf of himself and other Judges¹. 'And as touching the baronies,' to use their own words, 'their opinion is that the same descended to the general heirs of John the fourth Earl of Oxon, who had issue, John the fifth Earl of Oxon, and three daughters, one of them married to Lord Latimer, another to Winckfield, and another to Knightly: which John, the fifth Earl, dying without issue, those baronies descended unto the said daughters as his sisters and heirs; but, those dignities being entire and not dividable, they became incapable of the same, otherwise than by *gift* from the Crown; and

¹ *Journals of the House of Lords*, March 1, 1625-1626 (vol. iii. p. 510), and Collins's *Collections*, pp. 269-275.

they, in strictness of law, reverted unto and were in the disposition of King Henry VIII ¹. CHAP. VII.

There is no sign of the doctrine of abeyance in these words. When the dignities *reverted* to the King, it is obvious that they were at his absolute disposal. He could renew them or not at his pleasure, and give them to whomsoever he pleased. The coheirs were '*uncapable*' of inheriting them, and if any one of the coheirs received any one of them it would be not in virtue of any right but as a *gift* (or in other words a new creation) from the Crown. The evidence, moreover, that there was as yet no conception of the principle of abeyance does not rest here. The Judges added that the Earls of Oxford who had succeeded John the fifth Earl had assumed the titles of the baronies in various documents, and their eldest sons, while they lived, had been styled Viscount Bolbecke. It seems, therefore, to be as clear as anything can be that neither in the popular ideas of the day, nor in the traditions of the family of de Vere, nor in the learning of the Judges, had that which is now called 'abeyance' any place. The Lords themselves accepted the opinion of the Judges, reporting to the King that the baronies 'are wholly in your Majesty's hands to dispose at your own pleasure ².'

In the reign of Charles II, however, there does at length appear to be an acknowledgement by the King, not only that when a barony descends to female coheirs he may declare which of them shall have the dignity, but also by implication that his power in relation to the barony does not extend beyond the coheirs and their representatives. Thomas, Lord Windsor, died in the troubled times of Charles I without issue. He had two sisters, the elder of whom (Elizabeth) married Dixie Hickman and had issue, a son Thomas. Immediately after the Restoration the services of the Windsor family were rewarded by the restitution to Thomas Hickman of the barony of Windsor.

Something like the principle of abeyance appears to be first recognized in the case of Lord Windsor in the reign of Charles II.

¹ *Journals of the House of Lords*, March 20, 1625-1626 (vol. iii. p. 535).

² *Ib.*, April 5, 1626 (vol. iii. p. 552).

CHAP. VII. This was effected by letters patent which Dugdale professes to have seen¹, and which Collins cites without any definite reference. There is no doubt that they did actually pass the Great Seal, though it is difficult to find an enrolment of them. On June 18, 1660, the new Lord Windsor 'brought in [to the House of Lords] his patent of restitution to the title and degree of a Peer of this Realm. which was read. And he took his place as Lord Windsor².'

According to a recital in his patent of restitution, it was for the King to declare which of two coheirs should enjoy a dignity.

The effect of the patent is set out with sufficient clearness in the contemporary Docket Book of the Privy Signet Office, an entry in which appears in the following words:—
'Lord Windsor.—A Grant (reciting that Henry Windsor had and enjoyed the dignity of Baron Windsor to him and his heirs and that he had issue Thomas, Lord Windsor, his son and heir [who died without issue] and two daughters, the eldest whereof married Dixy Hickman, Esq., who are both deceased, leaving issue Thomas Windsor alias Hickman their son, who now enjoys a great part of the ancient patrimony of the Lord Windsor, and reciting that it belongeth to his Majesty to declare *which of the said coheirs* shall enjoy the dignity of their ancestors) of restoration and confirmation of the said Barony and of the title and dignity of Baron Windsor, which the said Henry and Thomas successively enjoyed, unto the said Thomas Windsor alias Hickman and his heirs, in the place of the said Lord Windsor, To hold to him and his heirs for ever, and to have the same precedency and place in Parliament and elsewhere within the Kingdom of England as the said Henry and Thomas Barons Windsor (whilst they lived) successively enjoyed, and all other dignities and pre-eminences to a Baron of England belonging³.'

There was no express legal

Even in this case the contemporary Index to the Docket Book describes the patent as a 'creation,' and thus shows

¹ Dugdale, *Baronage*, vol. ii. p. 309.

² *Journals of the House of Lords*, June 18, 1660 (vol. xi. p. 67).

³ Signet Office *Docket Book*, June, 1660.

how new was the idea out of which has sprung the modern doctrine of abeyance. If, however, it only belonged to the King 'to declare which of the coheirs should enjoy the dignity of their ancestors,' it would appear that the dignity was now thought to be in the blood of the coheirs, and was not held to have *reverted* to the Crown as at an earlier time. Still it must not be forgotten that the words of the Patent do not embody any judicial decision. The Journals of the Lords are silent, except in so far as they tell how the Patent was brought into the House. It was by the grace and favour of the Sovereign, and not by any operation of law, that Lord Windsor gained his dignity and place in Parliament, and there is still no trace of the doctrine that upon the death of all the coheirs but one, or the extinction of all their lines but one, the surviving coheir or representative has a right to the barony.

CHAP. VII
decision on
the point
even in the
case of
Lord
Windsor.

It was not until the year 1695 that this right was definitely though not unanimously acknowledged. In February of that year, a motion was made in the House of Lords to appoint a day for the consideration of some points which had been raised in relation to the descent of baronies by writ. The matter was debated on the following March 19. The question was then put 'whether, if a person summoned to Parliament by writ, and sitting, die leaving issue two or more daughters, who all die, one of them only leaving issue, such issue has a right to demand a summons to Parliament.' It was resolved in the affirmative¹. Even then, however, some of the Lords dissented, being of opinion that the barony still remained at the King's disposal. As has already been shown, they had, beyond doubt, the earlier precedents in their favour. In later times, nevertheless, the resolution of the majority of the Lords has been held to be law, and the doctrine then asserted has been attributed to previous ages.

The right
of a
survivor of
coheirs to
a barony
not
acknow-
ledged by
the Lords
until 1695,
and then
not unani-
mously.

¹ *Journals of the House of Lords*, March 19, 1694-1695 (printed, vol. xv. pp. 552-553).

CHAP. VII.

Later statements as to the doctrine of abeyance : the barony of Camoys, 1839.

In the year 1839 a barony was called out of abeyance which was represented as having been in abeyance for no less than four hundred and thirteen years. In the Minutes of Evidence given before the Committee of Privileges, to whom the Petition of Thomas Stonor claiming to be senior coheir to the Barony of Camoys was referred, appears 'the unanimous opinion of the Judges,' as delivered by the Lord Chief Justice of the Court of Common Pleas (Sir. N. Tindal)¹. He laid down the following general rule as being of great antiquity :—'In the case of a barony descendible either to the heirs general or the heirs of the body, if the Baron die, leaving only daughters, or sisters, or other coheirs, the barony is in abeyance so long as more than one of such coheirs is in existence, but so, nevertheless that the Crown, the Sovereign of honour and dignity, may, at any time during such abeyance, determine it by conferring the dignity upon whichever of the coheirs it pleases; but if the Crown do not exercise such prerogative, and the lines of all the coheirs but one become extinct, then the abeyance is at an end, and such only surviving coheir is entitled, as a matter of right, to the enjoyment of the dignity.'

Dubious cases used in support : the barony of Cromwell.

The Chief Justice was alone responsible for the reasons assigned, and presumably also for the actual words of the report. He, therefore, may have introduced the very dubious cases upon which he relied as precedents. He said, for instance, that Henry VI, 'in the case of the Lord Cromwell dying without issue male and leaving several daughters, preferred the youngest.' The statement is in no sense correct. The last Lord Cromwell of the family in question died leaving his sister Maud his heir. She married Sir Richard Stanhope and had issue two daughters, Maud and Joan. The second daughter, Joan, married Sir Humphrey Bourchier and he was summoned to Parliament, in the second year of the reign of Edward IV, but apparently not before, as Humphrey Lord Cromwell,

¹ *Minutes of Evidence*, as above, pp. 314-321 (504-511).

‘chivaler¹.’ He was also summoned in the sixth and ninth years of the reign of Edward IV as Humphrey Cromwell, ‘chivaler²,’ and in the forty-ninth year of the reign of Henry VI, as Humphrey Bouchier de Cromwell, ‘chivaler³.’ There is nothing whatever to show that the barony was supposed to be in abeyance between the two daughters of Maud, or that the King had not absolute power to dispose of it as he pleased, or to create a new barony of the same name.

The Chief Justice also asserted that ‘John Grey, the descendant of one of the coheirs of Edward Charleton, Lord Powys, was summoned to Parliament in the twenty-second year of Edward IV, after the attainder and before the restoration in blood of John, Lord Tiptoft, the other coheir, enjoying, upon that writ of summons, the seat and precedence of his ancestor.’ This statement again is not borne out by the facts. The ancestor had been summoned as Edward de Charleton de Powys. The descendant was summoned as John Grey de Powes⁴, and there is nothing to show that he had any particular seat or precedence. No reliance can be placed on the varying order in which the names occur on the Roll of Letters Close, and, if it could, the Roll would rather tend to show that ‘John Grey de Powes’ took his seat as a junior Baron. There is no reason to suppose that, when John Grey de Powes was summoned to Parliament, the summons effected anything but a new creation.

The
barony of
Charleton
de Powys.

In a much more recent peerage case there was a resolution of a Committee of the House of Lords declaring that an abeyance occurred in the reign of Edward IV. It must, however, be submitted, with all respect, that an opinion given in the year 1877 is not conclusive with regard to the

Declara-
tion in
1877 by a
Committee
of Lords
that an
abeyance
occurred in

¹ *Rot. Lit. Claus.*, 2 Ed. IV, m. 5 d (printed in *Rep. Dig. Peer*, vol. iv. p. 958).

² *Ib.*, 6 Ed. IV, m. 1 d (printed, p. 966), 9 Ed. IV, m. 23 d (printed, p. 970).

³ *Ib.*, 49 Hen. VI, m. 6 d (printed, p. 977).

⁴ *Ib.*, 22 & 23 Ed. IV, m. 10 d (printed, p. 985).

CHAP. VII. opinions entertained in the year 1481. In relation to the barony of Mowbray a Committee of the House of Lords resolved on July 26, 1877, 'that on the death of Anne Lady Mowbray and Segrave, Duchess of York and Norfolk, in 1481, the baronies of Mowbray and Segrave fell into abeyance between John Lord Howard and William Viscount Berkeley, as the grandsons and the then coheirs of Thomas the first Duke of Norfolk,' and further 'that the abeyance of the said baronies was subsequently, and previously to the reign of Queen Elizabeth, determined in favour of the Howard family¹.' It is obvious, from the words of the resolution that both the abeyance and the calling out of abeyance had been merely inferred from the evidence laid before the Committee². The correctness of the inference must be judged not by the application of modern doctrines to ancient facts, but by the application of the doctrines of the time to the facts of the time. There is no proof whatever that the doctrine of the abeyance of a barony was in existence in the reign of Edward IV, and there is evidence that it was not in existence at a much later period.

Paucity of cases subsequent to that of Lord Windsor except in the years from 1829 to 1841.

The earliest case in which anything like the doctrine of abeyance was recognized was, it is almost certain, that of Lord Windsor, in the reign of Charles II. The coheir then had given to him not only the barony but also the precedence and place in Parliament of previous Lords Windsor. Even since the time of Charles II, the instances in which a barony has been called out of abeyance have been rare. In the hundred and sixty-nine years, from 1660 to 1829, there were but eleven; and two of these related to the same barony (of Zouche). From 1829 to 1841 it was the fashion to call baronies out of abeyance; and no less than eight (one of which, the barony of Berners, appears on two

¹ *Journals of the House of Lords*, July 27, 1877 (vol. cix. p. 339).

² There is a monograph on the determination of the Mowbray Abeyance by Mr. J. H. Round in the *Law Quarterly Review*, vol. x. p. 68.

occasions) enjoyed that distinction in twelve years¹, the CHAP. VII. fortunate Barons taking the precedence enjoyed or supposed to have been enjoyed by their predecessors. Since 1841 the determination of abeyance has been less frequent, but the principle has not been disputed. It cannot claim a very high antiquity, but it has probably been accepted sufficiently often during the last two centuries to give it an established legal position. The practice, however, has varied even since the year 1660. Lord Windsor then had a declaratory Patent. In more recent times the usage has been (except when a barony has been confirmed by patent to a Peer already holding a higher dignity) to call a barony out of abeyance simply by the issue of a writ of summons to Parliament.

¹ *Return of Baronies called out of Abeyance*, H. L., Session 1858, no. 289.

CHAPTER VIII.

THE DOCTRINE OF BLOOD.

CHAP.
VIII.

NO history relating to the hereditary peerage would be complete without some reference to the remarkable doctrine as to blood which appears to have been a development of the ideas brought into England at the time of the Conquest, and which was, at any rate, firmly established early in the reign of Edward III. We have seen how the succession of the Counts and Dukes of Normandy continued in the blood of Rollo, how child succeeded to father, though the union of the parents had not received the sanction of the Church. The late period at which Neustria was conquered by the Northmen, and consequently at which they accepted Christianity, may possibly have been one of the causes which subjected Dukes of Normandy and William the Conqueror, among the number, to the aspersion of being bastards.

Blood
after the
Conquest :
corruption
of blood.

The French conquest of England was effected at a time when the power of the Church was increasing, and for that reason, perhaps, no descendant of William not born in Christian wedlock ever ascended the throne. For many centuries afterwards no form of marriage was recognized in England except that which was recognized by the Church. The lawyers, acting in agreement with the ecclesiastics, evolved the doctrine that a child not born in lawful wedlock was fatherless, *nullius filius*, no man's child. Subject, however, to the restriction that all blood had, as it were, to be church-marked, blood became of almost as much importance in law as in later times it has been held by men of

science to be in physiology; and there is the closest possible resemblance between the doctrine of the physiologists and the doctrine of the lawyers. Blood, according to both, had properties and capacities transmissible from generation to generation, and could, according to both, be corrupted with the gravest consequences to the offspring. CH. VIII.

It has been said by an eminent writer on the history of the Constitution that the doctrine of the ennobling of the blood of a Peer is an absurdity, chiefly, as it seems, because, according to his view, a younger son does not become ennobled when his father has a peerage which is hereditary. Regarded, however, as part of a general principle, the doctrine is no absurdity at all, but one which is perfectly intelligible, perfectly consistent with itself at all points, and as scientific as anything to be found in mediæval or even modern literature.

The doctrine of the ennobling of blood intelligible and consistent with itself.

Whenever any person, not being a corporation, held land in fee simple, there existed in his blood a capacity of inheritance—a capacity not limited to his eldest son, but pervading the whole of his descendants, and, in the absence of descendants, extending still further. It was a capacity which he himself had no power to destroy. He could not, before the reign of Henry VIII (except in virtue of certain local customs) affect the disposition of the land after his death by will. If he died seised of his estate in fee simple, the land could go only to his heir, who might be his eldest son, or the issue of his eldest son, or failing them a younger son, or failing a younger son and his issue a daughter or daughters, and so on according to the law of descent in relation to consanguinity. He was absolutely powerless to affect the inheritance or to destroy the virtue of his own blood. He could affect his heirs only by affecting himself. He could convey away his land during his lifetime.; and, in that case, it would of course no longer go to his heir. but solely because it was not his when he died. He in no way affected the capacity of the blood to inherit that which he held himself. There were some things of which a man could not divest himself at all in favour of another, and

The inheritance of lands inseparable from blood before the reign of Henry VIII.

CH. VIII. which, whether he would or not, must of necessity remain in his blood, unless destroyed or extinguished.

Seignory of
lands held
in frankal-
moign
inalienable
and in-
eradicable
from the
blood.

If a man gave lands to a Religious House, to hold of him and his heirs in frankalmoign, the seignory of those lands was so fixed in his blood that it could never afterwards be in any blood but his. No conveyance of the seignory to another person, no forfeiture, no recovery by action at law could affect it. As long as one drop of his blood existed on earth, so long did the seignory, if also in existence, attach to it¹. This particular seignory could be destroyed or extinguished only by failure of his blood, by release to the tenant, or by the tenant's alienation of the lands². The tenant then ceased to hold in frankalmoign of the donor or his heirs, and the particular tenure was at end.

As soon as hereditary peerage was established as a personal dignity, it bore a very strong resemblance to seignory of lands held in frankalmoign, especially in cases in which the inheritance was to the heirs general. It was from one point of view less absolutely in the blood than the seignory, because it was subject to forfeiture by the holder, the corruption of whose blood by attainder would extend the forfeiture to his descendants. From another point of view it was more absolutely in the blood than even the seignory, as soon as the doctrine was accepted that a Peer could not surrender or extinguish his dignity, though not before³. It exactly resembled the seignory in that it could not pass directly from the holder to a stranger in blood by any form of conveyance. In both cases we see a capacity or property inherent in the blood analogous to that which causes the posterity of a human being to be human, and the posterity of an individual of another species to be of that other species. As any one who is in the possible line of descent of the Crown is said to be of the blood royal, so any one who is in the possible line of descent of any peerage is of the inheritable blood in which that peerage runs.

¹ *Year Book*, Hil., 14 Ed. III, no. 19, pp. 268, 280-283.

² *Litt.*, sec. 139, 141; 2 *Inst.* 502.

³ See below, chapter xii. pp. 271-273.

Until very recent times (January 1, 1834¹) the doctrine of blood was applied in a very remarkable manner so as to exclude the half-blood from the inheritance of lands. When the right of females to inherit was recognized, the capacity to inherit might be transmitted to the offspring either from the blood of the father or from the blood of the mother. The mother, it is true, during the period of her coverture, had no status except as the wife of her husband, and he might even dispose of her lands. From the moment of his death, however, her rights of blood reasserted themselves, and the lands could be recovered by her or her heirs. Upon her death the lands descended to her heirs, subject only to the life estate of her husband, known as the 'curtesy of England,' should he happen to survive her. If she had two sons by her first husband, and the elder inherited after her death, and died without issue, the younger son was his heir, as being his brother of the whole blood. If she had only one son by a first husband, and another by a second husband, and the elder son became seised of the inheritance and died without issue, the younger son being only of the half-blood did not inherit. It might seem, at first sight, that in this case the younger son, having the mother's blood equally with the elder, should inherit on his brother's death. According to the old law, however, the descent, as it was called, was traced directly from brother to brother, and not backwards from the elder son to the mother, and from her to the younger son. The same principles were applied when the inheritance was on the father's side. His younger sons by his first wife were heirs to their elder brothers in succession when their elder brothers died seised without issue, but his sons by a second wife could never inherit from their elder brothers of the half-blood.

CH. VIII.
The descent of lands : common law doctrine as to the half-blood.

If no explanation of this curious rule could be found the doctrine might thus seem to be at variance with itself, because the younger son of the half-blood, possessing in

The reasons assigned for it.

¹ Stat. 3 & 4 Will. IV, cap. 106.

CH. VIII. each case the blood of the parent to whom the inheritance had belonged, in an equal degree with his elder brother, was yet excluded from that very inheritance in favour of a more remote kinsman. The reason usually assigned is, however, one which is consistent with the doctrine of blood in its most rigid application. Although it may be true that, upon the death of any particular person, there could hardly be a doubt whether he inherited from his father or his mother, yet, when the kinship had to be traced further back, the true source of inheritance might well be in doubt as between a husband and wife in some remote past generation. If, for instance, upon failure of all issue in the direct line, a descent had to be traced from a great-uncle, who died seised, it might, in the unlettered age of the earlier fiefs, have been uncertain whether he inherited from his father or from his mother. If he inherited from his mother, no half-brother on his father's side could possess that inheritable blood which would give a title to succeed. If, however, he had a brother of the whole blood, it is obvious that this brother must have possessed the true inheritable blood, whether the inheritance descended from the father or from the mother. The descendants of this brother of the whole blood would consequently inherit. The principle, framed in all probability in the interest of the sovereign or other lord, in order that he might not be defrauded of his escheat upon failure of heirs, had thus some plausibility as applied to distant consanguinity, and, perhaps for the sake of uniformity, perhaps still in the interest of the lord, it was also applied where the same grounds could not be alleged.

*Possessio
fratris.*

The exclusion of the half-blood sometimes had the effect of causing a female to succeed to the inheritance instead of a male. Thus if any one died seised of land, leaving a son and a daughter by a first wife, and a son by a second wife, and the elder son inherited and died seised without issue, the daughter then inherited and not the younger son. This fact was expressed in the well-known legal maxim, *Possessio fratris facit sororem esse heredem*.

It would appear to follow from this doctrine that when

any one was summoned to Parliament, as in the older times, CH. VIII. to perform the service due for any land, the summons would follow the law applicable to the descent of lands, the sister of the whole-blood would inherit, to the exclusion of the brother of the half-blood, and, when she married, her husband would have to perform the service, or in other words to attend in Parliament. As, however, the idea of barony by tenure faded away, and the idea gained ground that to be a Baron was to enjoy a dignity, the lawyers did not hold the principle of *Possessio fratris* to be applicable to an honour.

Possessio fratris in-applicable to any dignity except barony by tenure.

As early as the time of Sir Edward Coke it was held that there could be no possession of a brother which could cause a sister of the whole-blood to inherit a dignity to the exclusion of a brother of the half-blood. The descent was considered to be to the heir of the person first created noble and not directly to the heir of the last possessor of the dignity. On the death of an elder brother, his younger brother of the half-blood, though incapable of inheriting his lands, might nevertheless inherit the dignity from their common father, in whose blood it was supposed to be inherent. This doctrine was applied to all ranks among the temporal lords, to Dukes, Marquesses, Earls, Viscounts, and Barons¹.

Several reasons were assigned for this later diversity between the descent of lands and the descent of dignities. Noblemen in the higher grades of the peerage held their honours in virtue of charters or letters patent, Barons in virtue of letters patent or writs of summons. In all these cases the title to the peerage could be proved only by record in the Chancery, which necessarily showed who was the first holder, and consequently in whose blood the dignity must descend. There was no possibility of a doubt whether the inheritance was on the father's side or the mother's. The person claiming either was or was not the heir of the first of the family created or summoned. If both brother

Reasons for the different descent of lands and dignities.

¹ *Co. Litt.*, 15 b.

CH. VIII. and sister were of his blood, the brother was of course preferred.

The law
not fully
settled
before the
reign of
Charles I.

The Lords themselves, however, seem to have been perplexed by doctrines of succession as late as the reign of Charles I. In a peerage case then under consideration the Lords submitted to the Judges the question 'whether a *possessio fratris* can be upon a barony by writ.' The Judges were unanimously of opinion 'that there cannot be a *possessio fratris* in point of honour¹.' A special reason said to have been assigned by the Judges for this opinion was that no entry could be made upon the dignity of a Baron, and no profit derived from it, and that in these respects it differed from land upon which entry might be made, and from which the person in seisin derived 'esplees' or profits². However applicable this argument might be to a barony just before the Great Rebellion, it certainly could not have been applicable to earldoms of the twelfth century, a common feature of which was that the Earl received the third penny (or one-third of certain revenues) derived from his county. The principle of an Earl receiving profit from his office had without doubt fallen into oblivion, just as the idea of barony by tenure was, a few years later, held to be an anachronism.

Original
effects of
attainder
and corrup-
tion of
blood.

Upon attainder for any kind of felony (in which treason was originally included) the blood of the offender immediately became corrupted, and its capacity of inheritance was lost for ever, except, as we have seen, in relation to seignory of lands granted in frankalmoign. The lands reverted to the lord of whom they were held, and who, in the case of tenants-in-chief, was of course the King. On attainder for high treason all lands in possession were forfeited to the King directly. The effect of corruption of blood was not only that no one could inherit from the person attainted, but also that he could not himself inherit

¹ *Journals of the House of Lords*, Feb. 1, 1640-1641 (vol. iv. pp. 149-150).

² Collins's *Proceedings on Claims*, p. 256. Paper said to have been obtained from the son of Chief Justice Brampton, one of the Judges whose opinion was given.

from an ancestor. His incapacity thus affected all his descendants, and they were debarred from deriving a title through him from an ancestor more remote. CH. VIII.

The law of forfeiture and attainder was to some extent mitigated by the creation of estates tail¹, because when a tenant in tail was attainted, the forfeiture extended only to the term of his life. As he did not possess the fee simple he could not forfeit it, and thus the lands of many persons attainted of high treason remained in the same family, even when there was no reversal of attainder. In the reign of Henry VIII, however, an Act was passed which had the effect of bringing estates tail within the law of forfeiture for high treason². Effect of the creation of estates tail, until the reign of Henry VIII.

According to the older doctrine that a Baron was one who held in chief, or by barony, no one could have continued to be a Baron after his lands were forfeited. It has, indeed, sometimes been maintained that all the dignities of the peerage, including baronies, are within the category of 'offices of trust and confidence³.' In that case they could not of course be held after conviction of high treason. It has been shown, however, in this history, that although Earls commonly held baronies, the origin of the dignity of a Baron was entirely different from that of an Earl, and had not any relation to any administrative office. When the Baron acquired a prescriptive right to be summoned to Parliament, and with it a personal dignity, he was not bound to perform any duties which had not been performed in earlier times. He was, however, subject to the same law of forfeiture in respect of his lands, and according to the ancient precedents the dignity was lost at the same time. Forfeiture of baronies for high treason.

When an earldom was an office under the Crown, it was of course forfeited for treason to the Sovereign; and the precedent sufficed to ensure its forfeiture in later times, when it was an office no longer⁴. The higher ranks in the Forfeiture of earldoms and other dignities for high treason.

¹ Stat. *De Donis Conditionalibus* (Westm. 2.), 13 Ed. I, cap. 1; *Co. Litt.*, 392 b; *Bl. Com.*, ii. 116.

² Stat. 26 Hen. VIII, cap. 13. sec. 5; and see Stat. 5 & 6 Ed. VI, cap. 11. sec. 9.

³ *Fourth Rep. Dig. Peer*, vol. ii. p. 312.

⁴ 7 Rep. 33.

CH. VIII. peerage naturally followed the same rule; and thus, as a broad general principle, all dignities were forfeited upon attainder of high treason.

Question
as to the
effect of
entails
upon
attainder
of high
treason
between
1285 and
1534.

The doctrine of corruption of blood was also applicable, and the temporal lord lost his dignities not only for himself but also for his heirs for ever, or until the attainder was reversed by Act of Parliament. The only possible exception was in the case of a dignity held in tail, with regard to which there has been some difference of opinion. A dignity could be entailed¹, but only by the Crown. The earlier Barons and their descendants were, after a time, mostly recognized as Barons only in virtue of the writ of summons, which, when held to give an hereditary right, was held to give it to the heirs general of the body. This, however, was no entail, as there was no specific gift or grant to the person summoned and the heirs of his body, which was the essential condition of an estate tail. There had been but few patents of baronies before the statute of Henry VIII, which placed estates tail in the same position as estates of fee simple with regard to forfeiture. So also, though other dignities of the peerage had been created with limitations by charter, or letters patent, they were comparatively few in number, and circumstances rarely occurred in which the dignity could be claimed by virtue of an entail, after the attainder of the last possessor, and in the absence of any reversal of attainder. The narrowness of the field of search (extending only from the year 1285, when the law of entails² begins, to the year 1534, when an entail ceased to afford any protection in attainders of high treason) renders the task of finding illustrative instances extremely difficult³.

¹ *Co. Litt.*, 20 a.

² Stat. Westm. 2 (13 Ed. I), cap. 1 (*De Donis Conditionalibus*).

³ Neville's case (7 Rep. 33) is sometimes cited in relation to this subject. It does not, however, really bear upon the question whether an entail protected a dignity between 1285 and 1534. A claim to the Earldom of Westmoreland was set up in 1604 by Edward Neville. The previous Earl, Charles Neville, had been attainted of high treason in 1570. Edward relied upon the grant in tail male to Ralph Neville in 1397, whose heir according to the entail he represented himself to

The Peer who was attainted of felony also suffered corruption of blood. His lands, if not entailed, escheated to the superior lord, who was commonly the King; he lost his dignity, and his issue could not inherit. The Act of Henry VIII, by which all estates of inheritance (including estates tail) were rendered subject to forfeiture for high treason, did not render them subject to forfeiture or escheat for felony; and consequently it seems that a dignity entailed would descend to the heirs of the body of the person attainted, if a dignity were subject to the same law of entail as lands.

CH. VIII.

An entail saves the rights of the heir to a dignity after an attainder of felony.

The best illustration in support of this doctrine is, perhaps, the case of John, Baron Stourton, whose ancestor John had been created a Baron in tail male by Henry VI¹. His father, Charles, Baron Stourton, had been attainted of felony in the reign of Philip and Mary. He, however, was summoned to Parliament, and took his seat on February 11, 1575-6². On the following March 6 a Bill was introduced for the restitution in blood of him and of his brethren and sisters, and was read a third time on the following day³. That Bill, however, never became an Act⁴, and he, nevertheless, continued to sit in the House of Lords. He must, therefore, have enjoyed the dignity by inheritance, notwithstanding any corruption of his father's blood, or he must have enjoyed it as a new creation in virtue of the writ of summons. In the latter case he could have been succeeded only by the heirs of his body. He died, however, without issue, and his brother Edward was summoned in his stead. In this case, therefore, as in some others,

Illustration from the barony of Stourton.

be. He was unsuccessful; but it is not certain that, had the case occurred eighty years earlier, he might not have succeeded.

¹ *Rot. Lit. Pat.*, 26 Hen. VI, part ii. m. 26.

² *Journals of the House of Lords* (vol. i. p. 731).

³ *Ib.*, March 6 and 7, 1575-6 (vol. i. pp. 742 and 743).

⁴ If such an Act had passed, it would be upon the Parliament Roll of 18 Elizabeth. There is no such Act upon that Roll, nor does it appear that any such Act was passed during the reign. It is said in D'Ewes's *Journals of the Commons* (pp. 264-265) that the Lords would not accept a *proviso* inserted in the Bill by the Commons.

CH. VIII. it seems that the grant of a dignity to a man and the heirs male of his body had the effect of saving it for the heir when the holder was attainted of felony.

Prospective legislation in 1708, to save the rights of heirs of persons attainted of high treason.

In the reign of Queen Anne (shortly after the Union with Scotland) an Act was passed with the object of abolishing, at a future time, the effects of corruption of blood upon attainder for high treason. It was enacted that, after the death of the Pretender James, and three years after the accession of the Queen's successor to the throne, no attainder for treason should cause any heir to be disinherited, or prejudice the right of any person but the actual offender¹. When, however, in the year 1744 a rising was expected under Charles Edward, son of the elder Pretender James, it was enacted that the operation of the Act of Queen Anne should be postponed until the decease not only of James but of all his sons².

Restriction of forfeiture in 1814, and practical abolition, in 1870, of attainder and corruption of blood.

Thus the old law, as it was after the Act of the reign of Henry VIII, by which estates tail were brought within the doctrine of forfeiture for high treason, remained practically unchanged in England, though it did not extend to Scotland³. In the year 1814, however, forfeitures for felonies in general, though not for high treason, petty treason, or murder, were restricted to the life-time of the person attainted⁴. Forfeiture, except when consequent upon outlawry, was altogether abolished in the year 1870, when it was enacted that no judgement of or for any treason or felony should 'cause any attainder or corruption of blood, or any forfeiture or escheat'⁵.

¹ Stat. 7 Anne, cap. 21. sec. 10.

² Stat. 17 Geo. II, cap. 39. sec. 3.

³ The law had been otherwise in Scotland before the Union, and the rights of heirs in tail were guarded shortly afterwards by the 7 Anne, cap. 21. sec. 4.

⁴ Stat. 54 Geo. III, cap. 145.

⁵ Stat. 33 & 34 Vict. cap. 23. sec. 1.

CHAPTER IX.

THE POSITION OF THE SPIRITUAL LORDS.

CHAP. IX.

Anomalous
position
of the
Bishops:
their
election.

IT has already been shown that in parts of the Roman empire which the barbarians overran, the Bishops commonly became advisers of the Crown as soon as the conquerors accepted Christianity. Their position was anomalous, because, although in feudal times they had investiture of their temporalities from the King, they obtained their offices by election, and not, like Earls or Counts, on the nomination of the Crown. In the reign of Henry I, after a struggle with Archbishop Anselm, a compromise was effected, in accordance with which the previous mode of investiture was abandoned, and the King received the homage of the Bishops. At the same time the election of Bishops, which had previously been in the *Curia Regis* by clergy and laity, was placed in the hands of the clergy alone. This arrangement was confirmed by successive charters, and notably by one of King John, in which he undertook not to withhold his licence for the election (*congé d'élire*), or refuse approval afterwards, without just cause¹.

The
spiritu-
alities
and the
tempor-
alities.

After election, if followed by the King's assent, the Bishop elect was confirmed by the Metropolitan, and then had restitution of the spiritualities, or ecclesiastical jurisdiction, which had rested, during the vacancy of the see, with the Guardian of the Spiritualities. This, however, did not place him in possession of the temporalities of the see.

¹ The charter is printed in the *Statutes of the Realm*, vol. i. p. 5. There was a confirmation by the 25 Ed. III, St. 6 (*Provisors*). sec. 3.

CHAP. IX. He was not yet a Baron, for he had not yet obtained those lands which were held in barony in right of the bishopric. He could have livery of the temporalities only on making an oath of fealty to the King. This was commonly done before his consecration, after which he had all the liabilities and privileges of Bishop and Baron, including that of the writ of summons to Parliament.

Similar
position of
Abbots.

The proceedings by which an Abbot was made were similar in cases in which the Abbey was of royal foundation; and this would probably be assumed when successive Abbots of the same House were summoned to Parliament for a long period of time. The Crown sometimes, indeed, asserted a royal foundation, for purposes of its own, when the Abbots warmly disputed the fact¹. Licence to elect, election by the Convent or members of the religious House, the royal approval, and restitution of the temporalities, which had been taken into the King's hand when the vacancy occurred, were all necessary before the new Abbot could be in full possession of his abbacy or of the lands held in its right.

The power
of the
Crown in
relation to
Prelates.

There is no need to trace in detail the attempts which were made by Popes to obtain the power of appointing English Bishops. They belong to the domain rather of the history of the Church than to that of constitutional history. They were never more than partially successful, and, while they continued, they were merely an indication of the power of the Church, which was exerting its influence over England in various other ways. Had they been carried so far as seriously to threaten alien interference in the King's Council and Parliament, the Crown had a remedy. It could always withhold approval of the election, and retain the temporalities of the vacant see or abbey in its hands. Such an extreme measure would, no doubt, have added one to the many quarrels which English kings had with the Church. The mere possibility of it, however, must to some extent have acted as a check upon papal

¹ E.g. *Year Books*, Trin., 14 Ed. III, no. 46.

pretensions, and generally have secured the appointment of a prelate who was not at the moment altogether obnoxious to the King. Henry VIII succeeded very adroitly in obtaining for the Crown the power of nominating the Bishops. In his reign it was enacted that when any see became vacant the King might send to the Prior and Convent or the Dean and Chapter (as the case might be), which had the power of election, his *congé d'élire*, together with a Letter Missive containing the name of the person to be elected. Should they defer the election beyond twelve days, the King had power to nominate and present by Letters Patent under the Great Seal¹.

Thus, until the power of the Church was broken about the time of the Reformation, all the Lords Spiritual sat in the House of Lords, only after election. Whatever influences might have been brought to bear before they were elected, they might be regarded as representatives of those who elected them. In their case the King was not the fountain of honour; and although they could not obtain possession of the baronies belonging to their sees without his consent, it was not he whom they had to thank for their elevation.

Bishops and Abbots, it is well known, were summoned, before the Conquest, to the Witenagemot, and it has sometimes been inferred that they were called to later English Parliaments by reason of their spiritual office, and not solely in virtue of the baronies which they held by military service after the Conquest. It has even been denied that the Conqueror applied military tenure to Church lands. There is, however, no doubt that Bishops and Abbots did, after the Conquest, hold baronies in chief of the Crown by military service; and although strictly contemporary evidence may be wanting as to the exact date at which they began to occupy this position, there does not appear to be any strong reason against the date assigned by Matthew Paris. According to him, the Conqueror placed under military

¹ Stat. 25 Hen. VIII, cap. 20. sec. 4.

CHAP. IX. service all bishoprics and abbeys holding baronies in the year 1070, setting down *at his pleasure* the number of knights to be supplied by each¹. The statement accords extremely well with the fact that no uniformity can be discovered with regard to the number of knight's fees in a barony, whether lay or ecclesiastical. It is confirmed by testimony which is clearly independent—by the Chronicle of Abingdon² and by the History of Ely³. It is in harmony with the position of the Bishops in the King's Court according to the Constitutions of Clarendon. It agrees with the remarks of Bracton made in the reign of Henry III, that the King had power to direct process against Bishops by reason of their baronies⁴. It is also quite consistent, as will hereafter be shown, with the subsequent claims of Bishops to be considered Peers of the Realm on the ground of holding by barony.

The Bishops had no desire to be summoned to the early Parliaments.

To speak of a seat in Parliament as a privilege enjoyed by layman or ecclesiastic, in the early days of Parliaments, is to confuse modern with mediaeval ideas. No baron, lay or clerical, wished to be summoned, except to protect himself against inordinate taxation. No Bishop, as Bishop, wished to be summoned except in the interests of his order.

The *Praemunientes* clause in the writs of summons to them.

When the Archbishops and Bishops were summoned to a Parliament including Lords Spiritual and Temporal and Commons, it was usual, from the time of Edward I, to insert a clause in the summons directed to each of them which is commonly called the *Praemunientes* clause. The Archbishop of Canterbury, for instance, was commanded to warn the Prior and Chapter of his Church and all the Clergy of his diocese to attend with himself—the Prior and Archdeacons in person, the Chapter by one Procurator, and the Clergy by two. In other sees the warning was to be

¹ Matt. Par., *Historia Anglorum* (Rolls Series), vol. i. p. 13.

² *Chronicle of Abingdon* (Rolls Series), vol. ii. p. 3 et seq.

³ *Historia Eliensis* (Anglia Christiana Society), p. 276. The coinciding evidence of the three sources of information has been pointed out by Mr. J. H. Round in his essays on the introduction of knight service into England in the *English Historical Review*.

⁴ Bract. 427, 442 b.

given to the Deans also to be present in person. It will be observed that this summons, affecting the whole body of the Clergy, resembles the summons to Convocation of a later period. The summons, however, was to Parliament, as it is distinctly expressed that the clerical persons and representatives who were to accompany the Bishops were to treat, ordain, and act with the King and with the rest of the Prelates, the *Proceres*, and the other inhabitants of the Realm, and generally to give their consent. CHAP. IX.

The object, there can be no doubt, was to have the assent of the Clergy to the taxes which were to be imposed upon them. It was also with the same object, there can be as little doubt, that, during the vacancy of sees, writs were sent to the Guardians of the Spiritualities of the dioceses commanding them to come, or send a procurator or proxy, and warn the other ecclesiastics to be in attendance as usual. The fact that the Guardians of Spiritualities received a summons has sometimes been used as an argument to show that, even when the Bishops held baronies, their summons was in virtue of their ecclesiastical status, and that they came to Parliament as *Sapientes* or *Witan*, quite independently of their lay possessions. The summons to a Guardian of the Spiritualities during the vacancy of a see, however, cannot have any relation to the supposed wisdom of a Bishop when the see is filled. The Guardian of the Spiritualities had spiritual jurisdiction in his diocese, and he alone could direct the necessary warning to the rest of the Clergy. The temporalities being in the King's hand, the Guardian of the Temporalities had to account at the Exchequer for the profits derived from them, until they were sued out of the King's hand, but he had no power whatever to summon the Clergy or to bind the incoming Bishop.

The most conclusive proof, however, that the summons to the Guardian of the Spiritualities was solely for the purpose of ensuring the consent of the Clergy to taxes or other matters¹ to which their sanction was desired, appears

The summons to the Guardian of the Spiritualities during the vacancy of a bishopric.

It issued solely because he alone had power to call the

¹ It appears from *Rot. Lit. Claus.*, 21 Ed. III, part ii. m. 21 d

CHAP. IX. in the fact that no such summons was sent without the *Praemunientes* clause. When the King required the Bishops, as persons of wisdom or discretion, to attend a Council, he summoned, as might naturally have been expected, the Bishops themselves, but not any Guardians of the Spiritualities of vacant Bishoprics in that capacity. When there is a *Praemunientes* clause the Guardians of the Spiritualities receive a summons; when there is no such clause they do not. So also when the see was not vacant, but the Bishop was abroad (*in remotis agens*), there was an alternative summons to him or his Vicar-General¹, with the *Praemunientes* clause, not on account of the wisdom of the Vicar-General, but in order that the rest of the Clergy of the diocese might be duly warned. and might duly vote the supplies. It is true that the clause was preserved in the writ of summons, as a form, long after the persons who were to be warned had ceased to come to Parliament, and had attended Convocation instead. This fact, however, does not in any way disprove the origin of its insertion, or tend in any way to prove the superior discretion of the Guardian.

Abbots
and Priors
summoned
only as
holding by
barony,
and excused
when not
so holding.

With regard to Abbots and Priors, it is quite clear that they were rightly summoned to Parliament only because they held by barony, and that, if they did not hold by barony, they could claim to be excused as late as the reign of Edward III. This, indeed, is what might have been inferred from the passage of Britton already cited. The point is, however, made perfectly plain by the case of the Prior of Spalding. He, like his contemporaries, regarding attendance in Parliament not as a privilege but as a burden, represented that the lands of the Priory were held in frankalmoign of the Countess of Lincoln, and not of the King by barony or part of a barony. Neither he nor his

(printed, *Rep. Dig. Peer*, vol. iv. p. 573) that on one occasion at least the clergy were to be summoned in virtue of the *Praemunientes* clause, when no aids, tallages, or other taxes were to be imposed.

¹ *Rot. Lit. Claus.*, 1 Ed. III, part ii. m. 16 d (printed, *Rep. Dig. Peer*, vol. iv. p. 376).

predecessors had been summoned to Parliaments or Councils before the second year of Edward II. They had not been summoned uniformly, but only at intervals, and not of right, but only when they were willing (*voluntarie*). The Prior, complaining of the expense and trouble of coming to Parliaments or Councils, prayed a remedy. The facts, as alleged by the Prior, were established by inspection of the rolls of Chancery, and by certificate of the Treasurer and Barons of the Exchequer. The latter showed in particular that the 'Prior did not hold of the King by barony or by part of a barony, or in any other manner in virtue of which he ought to be summoned to such Parliaments or Councils.' The King therefore, after advice with his Council, and full deliberation, and in consideration of an immediate aid for the war in France, granted, for himself and his heirs, that the Prior and his successors should not be summoned to the King's Parliaments and Councils, 'but should be discharged and quit for ever from coming thereto¹.'

When a special meaning became attached to the expression 'Peer of the Realm,' the Bishops and the most powerful of the Abbots began to take precautions that there should be no derogation from their dignity as Peers. Under the Constitutions of Clarendon they had been required, as tenants *in capite*, or holding by barony, to do suit to the King, much against their will, and to attend with the rest of the Barons in the King's Court. By degrees they came to regard these irksome duties as badges of temporal superiority, which might be used with effect on certain occasions. If a temporal lord holding by barony was a Peer of the Realm, they may have argued, so also must be a spiritual lord holding in like manner by barony.

The earliest known use of the expression 'Peer of the Realm,' or *Pier de la Terre*, occurs in a document of the year 1322 (15 Edward II): 'For the honour of God and of Holy Church, and of our Lord the King, and for his profit

They begin to claim the position of Peers of the Realm as holding by barony.

The first use of the expression 'Peer of the Realm' in 1322.

¹ *Rot. Lit. Claus.*, 15 Ed. III, part ii. m. 14 (printed, *Rep. Dig. Peer*, vol. iv. pp. 535-536).

CHAP. IX. and that of his realm, and for the maintenance of peace and tranquillity among his people, and for maintenance of the estate of the Crown, show unto the King, the Prelates, Earls, and Barons, and the other Peers of the Land, and the Commons of the Realm,' certain charges against Hugh de Despenser the father, and Hugh de Despenser the son. One of the accusations was that the elder Despenser, by procurement of the younger, had caused the King to revoke a grant which had been confirmed in his Parliament at Lincoln 'at the request and with the assent of the Peers of the Land.' Another was that they had caused lands to be forfeited, and had not instead suffered the King 'to take reasonable fines from the Peers of the Land and others within his fee, as had been accustomed.' The charges were found to be true upon 'examination by the Earls, Barons, and other Peers of the Land,' and judgement was given by 'us, Peers of the Land, Earls, and Barons, in the presence of our Lord the King.' The Despensers were to be banished out of the realm of England, and never to return 'except with the assent of our Lord the King, and with the assent of the Prelates, Earls, and Barons, and that in Parliament duly summoned¹.'

The Prelates, though spiritual lords, were Peers only by virtue of their temporal possessions.

It will be observed that among these five passages in which the word 'Peers' occurs there is not more than one in which it is quite clearly applied to the spiritual lords, and there are two in which the spiritual lords cannot be included in the term. They cannot be among the 'Earls, Barons, and other Peers of the Land,' as spiritual lords are always mentioned before temporal lords. Still less can they be among 'us, Peers of the Land, Earls and Barons.' They do seem to be included as Peers in the first passage, 'Prelates, Earls and Barons, and the other Peers of the Land,' though even here the grammatical construction might leave a doubt. The true explanation seems to be that the Prelates, though recognized as spiritual

¹ Printed in the *Statutes of the Realm*, vol. i. pp. 181-184, from *Rot. Lit. Claus.*, 14 Ed. II, m. 14, *Cedula*.

lords, were not spiritual peers, and, so far as they were peers at all, were entitled to the name only in virtue of their temporal possessions, or baronies. The Bishops and Abbots are classed together under the one head of Prelates, and their title to the peerage must have been the same. CHAP. IX.

For most purposes, nevertheless, both Bishops and Abbots summoned to Parliament were, a few years later, regarded as Peers. In the year 1329 (3 Edward III) the Bishop of Winchester was described in a law report¹ as one of the Peers and Judges of Parliament. In like manner the right both of Bishops and of Abbots to some of the privileges enjoyed by Peers in civil actions was undisputed. The privilege of having knights on the jury when a Peer was a party was claimed by a Bishop in the thirteenth year of the reign of Edward III. It was allowed by the Court. and there was not even so much as a suggestion that. for this particular purpose, the Bishop was not to be regarded as a Peer². In the same year another privilege relating to a 'day of grace' was claimed by the Abbot of Ramsey on the ground that he held by barony and was a Peer of the Realm. He failed, for other reasons, to obtain that which was prayed on his behalf, but it was not denied either that he was a Peer, or that his peerage was consequent on his holding by barony³. The case of Stratford, Archbishop of Canterbury, in 1341, has some bearing on the claim of the Prelates to be regarded in all respects as Peers of the Realm, and will be considered in relation to the question of trial by Peers.

They enjoyed certain privileges of Peers, as holding by barony.

It was stated by counsel, and to all appearance admitted, in the reign of Edward III that when any question arose as to a name of dignity, there was an important distinction between that of Abbot or Prior and that of Earl. The question whether a man was an Earl could be determined only by record in the Chancery; the question whether he was Abbot or Prior lay in the cognizance 'of the

¹ *Year Book*, Easter, 3 Ed. III, no. 32, ff^o. 18-19.

² *Ib.*, Trinity, 13 Ed. III, no. 2. p. 291.

³ *Ib.*, Easter, 13 Ed. III, no. 24. p. 223.

CHAP. IX. country,' or (in other words) could be tried by a jury¹.

This shows, as clearly as can possibly be shown, that Abbots were not summoned to Parliament in virtue of any ecclesiastical dignity, with which the Chancery (the office whence the summons was directed) was not concerned, but solely in virtue of the baronies which the Abbots held.

They define their own claim to the peerage, as holding by barony in the reign of Richard II.

In the reign of Richard II the Prelates defined their claim to be of the peerage in very clear terms. The occasion was the 'appeal' brought in Parliament against Alexander Neville, Archbishop of York; Robert de Vere, Duke of Ireland; Michael de la Pole, Earl of Suffolk; Robert Tresilian, Chief Justice of England, and others. The Archbishop of Canterbury then made solemn declaration that 'of right, and by custom of the realm of England, it belongeth to the Archbishop of Canterbury for the time being, as well as others his Suffragans, Brethren, and Fellow Bishops, Abbots and Priors and other Prelates whatsoever, *holding of the Lord the King by barony*, to be present in person, in all the King's Parliaments whatsoever, as Peers of the Realm aforesaid, and there, with the other Peers of the Realm, and with other persons having the right to be there present, to advise, treat, ordain, establish, and determine as to the affairs of the realm, and other matters there wont to be treated, and to do all else which there presses to be done.' With regard to all and each of these matters, he protested that he and they intended to be present, and take part in that Parliament, 'save our estate and order and that of each of the Prelates in all things. But because in the present Parliament there is question of certain matters, in which it is not lawful for us or any one of the Prelates, according to the Institutes of the Holy Canons, in any manner, to take part personally,' we intend to retire, '*saving always the right of our peerage*'². The Bishop of Durham, on his own behalf, and the Bishop of Carlisle, also on his own behalf, made like declaration. The Archbishop of

¹ 22 Li. Ass. 24.

² Rot. Parl., II Ric. II, no. 6 (printed, vol. iii. pp. 236-7).

York was of course unable to say anything in relation to himself or the Prelates of his Province as he was one of the persons accused, and did not appear. CHAP. IX.

We thus know precisely what position the Prelates took up in the reign of Richard II, and that they did not advance any claim to the peerage, except as holding of the King by barony. They did not assert that they were Peers in virtue of any spiritual office, but, on the contrary, expressly saved the rights of their order, whatever those rights may have been, and so drew a distinction between their position as Prelates and their position as the King's tenants by barony, and Peers. They were, no doubt, covertly asserting their ancient pretensions to be as nearly as possible free from all lay jurisdiction when put upon their trial. The assertion made by themselves that they were Peers of the Realm was neither denied nor admitted on this occasion, as they withdrew immediately after making their declaration or protest.

The doctrine as to blood and its capacities is of great importance in relation to the position of Lords Spiritual as compared with Lords Temporal. It is, as we have seen, not to be disputed that Spiritual Lords were in the reigns of Edward III, and Richard II, described as Peers of the Realm. It is, however, certain that neither during those réigns nor at any other time were they in the same position as the Temporal Lords with regard either to their peerages, or to the lands in virtue of which some or all of them were recognized as Peers.

They were never in the same position as Temporal Lords even with regard to their lands.

A Spiritual Lord held lands by barony, but yet his estate in his lands was never the same as that of a Temporal Peer. It differed in relation to the most important legal doctrine of blood. No Spiritual Lord could, as such, transmit his lands or his dignity to an heir. After his death his lands and his dignity went to his successor. If he committed treason or felony and was attainted, the corruption of his blood had no effect on the succession of his lands or of his dignity. Whether Bishop or Abbot, a Spiritual Peer was always a corporation, either a corporation sole or the head

No corruption of blood affected the succession to their lands or dignities.

CHAP. IX. of a corporation aggregate; and the blood of a corporation could not be corrupted, or rather a corporation had no blood to corrupt. A corporation aggregate could not commit either treason or felony, and could not therefore be subject to the penalties following upon the commission. If a person who, in his official capacity, was a corporation sole, committed treason or felony, he committed it as an individual and not as a corporation, and it was only as an individual that he could suffer the penalty. A parson might be attainted for treason, and executed, but the glebe and the tithes were not forfeited to the Crown. A Bishop or an Abbot might also be attainted, but the temporalities of the bishopric or abbey, though seized into the King's hand during vacancy, still remained the right of the abbey or bishopric, and the succeeding Abbot or Bishop was summoned to Parliament.

A Bishop did not even necessarily hold his particular dignity of Bishop or his lands for life.

Regarded from one point of view a Bishop did not even hold either his particular dignity of Bishop or the lands attached to his bishopric for life. He was subject to deprivation, in which case his lands and his dignity went to his successor. He might be translated to another see, in which case the lands and the dignity of his first see went to his successor during his own life, and he acquired new lands and a new dignity. His dignity, however, was purely ecclesiastical; his summons to Parliament, after the Conquest, was solely in consideration of the lands which he held in barony. He was a Lord of Parliament, and was styled a Spiritual Lord. He was a Peer, but not a Spiritual Peer, as he derived his only claim to that title of honour from his lay fees. He was not summoned and could not sit in Parliament until he had obtained possession of the temporalities of his bishopric.

The peculiar tenure of the Spiritual Lords not necessarily a disqualification for

There is nevertheless good reason to believe that the nature of their tenure would not have disqualified Bishops and Abbots from being Peers in every sense of the word, had they been prepared to act as other Peers on all occasions. The Prior of the Knights of St. John of Jerusalem in England, held his lands in the same manner

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complete
peerage :
the Prior
of St. John
of Jeru-
salem.

as any Abbot, and he was not only a Peer in all other senses, but sat in the Court of the Lord High Steward as Baron and Peer, and gave his verdict of Guilty or Not Guilty when a Peer of the Realm was there brought to trial¹. The Bishops and Abbots might have been no less fully recognized as Peers of the Realm had the canons of the Church not forbidden them to be present where judgments of life or member were concerned, and had they not attempted to render themselves exempt from all secular jurisdiction. They missed their opportunity by grasping at too much.

The Lords
Spiritual
let fall
their claim
to peerage :
while the
Prior of
St. John
was Baron
and Peer in
the reign of
Henry VII,
an Abbot
was styled
only a Lord
of Parlia-
ment.

One of the most remarkable facts in the history of the Bishops and Abbots, considered as Spiritual Lords, is that they ceased to be regarded as Peers of the Realm, while the Priors of the Knights of St. John of Jerusalem, who were not fettered, like them, by the canons of the Church, were not only Barons but Peers to the last. The practice of trying Peers in the Court of the Lord High Steward, in which the Lords Spiritual could not say Guilty or Not Guilty, or pass sentence, and to which, as a necessary consequence, they were not summoned, was probably one of the factors in the exclusion of the Lords Spiritual from the rank of Peers. They still held by barony, but as the idea of tenure by barony among laymen gradually died out, the tenure ceased to be of itself a sufficient title to peerage. In the very year in which John Kendall, Prior of the Knights of St. John of Jerusalem, sat among the Barons who tried the Earl of Warwick, the Abbot of St. Albans was, in a law report, styled not a Peer of the Realm but only a Lord of Parliament².

Grant to
the Abbot
of Tavistock
to be
a Lord of
Parliament

Early in the reign of Henry VIII the position of the Spiritual Lords received a very curious illustration in a grant to the Abbot of Tavistock. His predecessors had been frequently summoned to Parliament at various times

¹ *Baga de Secretis*, Pouch II (15 Henry VII), Pouch IV, Bundle 5 (13 Henry VIII).

² *Year Book*, Trin., 15 Hen. VII, fo. 9. no. 12.

CHAP. IX. down to the twenty-third year of Edward III¹, but so far
 in the reign of Henry VIII. as is known, not afterwards. In the recital of the grant it appears that Henry wished 'the Abbey or Monastery to enjoy the honour, privilege, and liberties of the Spiritual Lords of Parliament.' He therefore granted to Richard Banham, then Abbot of Tavistock, that he and each succeeding Abbot of Tavistock should be 'one of the spiritual and religious Lords of Parliament,' and enjoy all the honour, privileges, and franchises attaching to the rank. It was, at the same time provided that should any Abbot of Tavistock be absent from Parliament, when summoned, he should pay for every absence during any whole Parliament the sum of five marks². This provision was set forth in the light of a favour allowed by reason of the distance which the Abbot might have to travel.

The doctrine that a Spiritual Lord was a Peer of the Realm was now extinct.

The doctrine that a Spiritual Lord was a Peer of the Realm was now evidently extinct. He was a Lord of Parliament, and nothing more. The Abbot of Tavistock was in the same condition as many other Abbots whose predecessors had been sometimes, but not always, summoned to Parliament, whose predecessors had had the burden of a summons, and had not recognized the dignity conferred by it. It can, perhaps, hardly be said that Henry created the Abbot of Tavistock a Lord of Parliament, as his remote predecessors had sat among the Prelates. But Henry did, at the least, declare that he and his successors should be considered Lords of Parliament, whether they came to Parliament or not. Had the same policy been pursued in relation to other Abbots, the power of the Church would have been greatly increased in the House of Lords, notwithstanding the denial of the coveted title of Peer of the Realm. The dissolution of the greater monasteries, however, a few years later had a directly opposite effect.

¹ *Rot. Lit. Claus.*, 23 Ed. III, part i. m. 19. d (printed, *Rep. Dig. Peer*, vol. iv. p. 584).

² *Originalia Roll* (Lord Treasurer's Remembrancer of the Exchequer), 5 Hen. VIII, Ro. 12.

The Spiritual Lords themselves appear to have now accepted their position as merely Lords of Parliament, and not Peers of the Realm. Archbishop Cranmer made no claim of peerage when brought to trial in the reign of Queen Mary. Staunford, who was a Justice of the Court of Common Pleas in the time of Philip and Mary, and whose recollection must have extended many years backwards, compiled an excellent treatise on Pleas of the Crown. Bishops and Abbots, he there wrote, 'enjoy the name of Lord of Parliament . . . not in respect of their nobility, but in respect of their possessions—of the ancient baronies annexed to their dignities ¹.' Sir Edward Coke also wrote to the same effect ². In later times this appears to have been held as settled law. The point is of importance, however, chiefly in relation to the mediaeval doctrine of Blood, and to the right of Trial by Peers. Further reference is made to it in the chapter on the latter subject.

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The Prelates continued to be Lords of Parliament in respect of their ancient baronies.

Though not in all respects on the same footing with the Temporal Lords, the Spiritual Lords had an equal amount of power until the greater monasteries were dissolved by Henry VIII. Upon inspection of the earlier writs of summons it will be seen that the number of Bishops, Abbots, and Priors summoned to Parliament was sometimes in excess of the number of the lay Peers, and that sometimes the conditions were reversed; but after the reign of Henry III there was never a very large majority on either side except, perhaps, when the laymen were absent on military service. New lay Peers were created, but on the other hand lay peerages became extinct, while there was always a successor to the ecclesiastical baronies which were held in mortmain. Just before the dissolution of the monasteries there appear to have been twenty-six Abbots and two Priors who were summoned to Parliament. After the dissolution six new bishoprics were created, and of those six one (that of Westminster) ceased to exist on the translation of the first Bishop to another see in the reign of

Dissolution of Monasteries: loss of power by the Spiritual Lords.

¹ Staunford, *Les Pleez del Coron*, lib. iii. p. 153.

² 3 Inst. 30.

CHAP. IX. Edward VI. The strength of the Spiritual Lords was thus diminished by twenty-three votes.

They continued to grow relatively weaker in the House of Lords.

The Church never regained any of its lost power in the House of Lords, but on the contrary became continually weaker as new lay peerages were created in greater numbers. In the time of Sir Edward Coke the House consisted of twenty-four Spiritual Lords (the Archbishops and Bishops), sitting by succession in respect of the baronies which were 'parcel of their bishoprics,' and one hundred and six Lords Temporal sitting by reason of the dignities which they held by descent or creation¹. In the reign of Henry VIII the number of the Temporal Lords had been computed to be about fifty-five, and it had thus nearly doubled in about three-quarters of a century. The subsequent changes of proportion are shown more in detail in the chapter on the Changes in the Component Parts of the House of Lords. It may, however, be mentioned here that another blow was given to the status of the Spiritual Lords when it became law that not even the whole of the Bishops should be entitled to a seat in the House.

Some Bishops are now no longer even Lords of Parliament.

In the year 1847 it was enacted² that when any vacancy occurred in any see except those of Canterbury, York, London, Durham, or Winchester, the Bishop elected to the vacant see should not immediately be entitled to a writ of summons to the House of Lords, unless translated from the see of a Bishop actually sitting as a Lord of Parliament. The Bishopric of Manchester had then been newly created, and it was specially provided that the number of Lords Spiritual sitting and voting as Lords of Parliament should not be increased by the creation. There would thus be always one English or Welsh Bishop without a seat in the House of Lords. A Bishopric of St. Albans was created in the year 1875, and it was again provided that the number of Lords Spiritual sitting and voting as Lords of Parliament should not be increased, and that when a vacancy occurred in any see except the five previously excepted,

¹ 4 Inst. 1.

² Stat. 10 & 11 Vict., cap. 108. sec. 2.

a writ of summons should issue to the 'longest appointed Bishop' who had not previously been entitled to it¹. The same words were used when the new Bishopric of Truro was created in the following year². In the year 1878 no less than four new Bishoprics were created (Liverpool, Newcastle, Southwell, and Wakefield), and with similar provisions regarding the seat in the House of Lords³. There are thus always seven Bishops without a seat, and waiting their turn for a writ of summons according to seniority.

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In relation to the indisputable fact that Bishops once claimed to be Peers of the Realm in virtue of the baronies which they held, the comparatively recent transfer of the lands of the sees to Ecclesiastical Commissioners is of some interest. The Ecclesiastical Commissioners were first incorporated in the year 1835⁴. Powers were given to them to prepare schemes in accordance with the recommendations contained in the reports of Commissioners 'to consider the state of the several dioceses in England and Wales with reference to the amount of their revenues' and other matters⁵. It had been recommended that there should be certain rearrangements of the various dioceses, and that, in order to provide for the augmentation of the incomes of the smaller bishoprics, such fixed annual sums should be paid to the Ecclesiastical Commissioners, out of the larger sees, as should leave an average annual income to the Archbishop of Canterbury of fifteen thousand pounds, to the Archbishop of York and the Bishop of London of ten thousand, to the Bishop of Durham of eight thousand, to the Bishop of Winchester of seven thousand, to the Bishop of Ely of five thousand five hundred, to the Bishop of St. Asaph and Bangor of five thousand two hundred, and to the Bishop of Worcester and the Bishop of Bath and Wells of five thousand each. Out of the fund thus accruing

The ancient baronies in virtue of which Bishops claimed to be Peers now vested in the Ecclesiastical Commissioners.

¹ The Bishopric of St. Albans Act, 1875, sec. 7.

² The Bishopric of Truro Act, 1876, sec. 5.

³ 41 & 42 Vict., cap. 68. sec. 5.

⁴ Stat. 6 & 7 Will. IV, cap. 77. sec. 1.

⁵ *Ib.*, sec. 10.

CHAP. IX. fixed annual payments were to be made by the Ecclesiastical Commissioners so that the average annual incomes of the other Bishops should not be less than four nor more than five thousand pounds. The scale of payment was to be subject to revision at the end of every seven years¹.

Various modifications were effected by subsequent Acts, and in the year 1860 it was enacted that upon the first avoidance of the see of any Archbishop or Bishop in England all the lands belonging to it (except lands attached to residences in a scheme sanctioned by Order in Council) should become vested absolutely in the Ecclesiastical Commissioners². It was also provided that after the lands of a see had become vested in the Commissioners an arrangement should be made for assigning to its Archbishop or Bishop such lands as might be convenient, and as would secure, as nearly as possible, a net annual income equal to that named in any Act of Parliament or Order in Council in force. and no more³. Archbishops and Bishops were further restrained from granting any of the lands assigned as their endowment except from year to year, or for a term of years in possession not exceeding twenty-one⁴. To this low worldly estate fell the successors of those Archbishops and Bishops who had once proudly boasted that they held by barony and were Peers of the Realm.

¹ Stat. 6 & 7 Will. IV, cap. 77. sec. 1.

² Stat. 23 & 24 Vict., cap. 124. sec. 2.

³ *Ib.*, sec. 3.

⁴ *Ib.*, sec. 8.

CHAPTER X.

JUDGEMENT BY PEERS TO THE REIGN OF RICHARD II: END OF
APPEALS IN PARLIAMENT: BEGINNING OF IMPEACHMENTS.

IF a passage in the so-called Laws of Henry I¹ may be disregarded, the first mention of the 'Judgement of Peers' in England occurs in the Great Charter of King John. 'No free man is to be taken, or imprisoned, or disseised, or outlawed, or in any way destroyed, nor will we proceed against him, or direct proceeding against him, except in accordance with the judgement of his peers, or in accordance with the law of the land².' It would, perhaps, be impossible to exaggerate the importance of these provisions for the protection of the subject; but the words 'judgement of his peers' must, at the time, have had a more restricted application than is commonly attributed to them.

CHAP. X.
Judgement
of Peers
in King
John's
Great
Charter.

It is often asserted, and still more often assumed, that the judgement of a man's peers, in the case of a person of lower estate than that of a Peer of the Realm, must have been, in some way, the equivalent of trial by jury. It is absolutely impossible, for two distinct reasons, that the words can have had any such sense. In criminal cases, trial by jury had not even been instituted, and the only modes of trial were by ordeal, by compurgation, and by battle. From the time when trial by jury first commenced, either in civil or in criminal cases, to this present end of the nineteenth century, no jury

It had no
connexion
with Trial
by Jury.

¹ *Leges Henrici Primi, Regis Angliae*, cap. 31.

² King John's *Great Charter*, cap. 39.

CHAP. X. ever did or could give judgement on any matter whatsoever. The one persisting function of every jury (except the accusing, presenting, indicting, or 'Grand' Jury) is, and always has been, to find a verdict, and not to give a judgement—to inform the Court of the facts, in order that the judgement may be pronounced by the Court.

It had reference to matters connected with feudal tenure.

King John bound himself in such a manner as to show that 'judgement of peers' was one thing, the 'law of the land' another. The 'judgement of peers' was, as will presently be shown, a very simple matter and well understood at the time. The 'law of the land' included all legal proceedings, criminal or civil, other than the judgement of peers. The judgement of peers had reference chiefly to the right of land-holders to their lands, or to some matters connected with feudal tenure and its incidents. Thus in another part of the charter a special remedy is provided for cases in which any one 'had been disseised' or removed by the King 'without lawful judgement of his peers, from his lands, his castles, his franchises, or his rights¹.' So also in the case of Welshmen disseised or removed without lawful judgement of their peers, any dispute was to be settled by lawful judgement of their peers in accordance with the law (or particular custom) in Wales, England, or the Marches, as the case might be².

Suit of Court: the *Pares Curtis* or *Curiae*.

The judgement of peers in the case of persons holding their lands not directly of the Crown, but of a mesne lord, was the judgement of the other tenants of that lord, who owed suit to the same Court, and were in that respect all *peers*, or equals. A tenant in chief, holding of the Crown a wide expanse of land, usually (until restrained by the Statute of *Quia Emptores*) enfeoffed persons, to hold of him, as their lord, by certain services. One of these services was almost invariably Suit of Court, or the obligation to attend the Lord's Court at stated times, if summoned,—ordinarily once in three weeks. The Court was described as the Baron's Court, or in the French of the period as *Court*

¹ King John's *Great Charter*, cap. 52.

² *Ib.*, cap. 56.

Baron. The Peers of the Court (*Pares Curiae* or *Pares Curtis*) were known wherever the feudal system prevailed ¹. CHAP. X.

At the time when John granted his Great Charter, the remedy for the recovery of land by the possessory action of Assise of Novel Disseisin was still comparatively new, though it already formed a part of 'the law of the land.' Judgement in assise was given by the King's Justices. The higher remedy, however, had been, was, and long continued to be the Writ of Right, the essential feature of which was, when tenants not holding in chief were concerned, that it had to be brought in the Court of their superior Lord. It issued out of the Chancery and purported to be a command from the King to the Lord to do full right ². In later times, the cause was commonly removed, after commencement in the Lord's Court, by due process, into the County Court, and thence into the Court of Common Pleas. In John's reign, however, the Court Baron was of more importance than it was when the King's Courts had obtained their full development; and the cause of a vassal which had relation to his feudal rights was commonly decided by his fellow-vassals—by his peers—in the Court of their common lord.

The Court Baron and the Writ of Right for under-tenants.

The rights of the Barons in relation to their Courts were most jealously guarded in the Charter. 'The writ called *Praeceptum* shall not henceforth be made out for any one in respect of any tenement in such a manner that a free man can lose his Court ³.' This writ, known in later times as *Praeceptum in capite*, was the Writ of Right applicable to a tenant in chief of the Crown as distinguished from an undertenant owing suit to the Court of his Lord. The effect of using the *Praeceptum in capite* in the first instance as

The *Praeceptum in capite*, or Writ of Right for one holding in chief.

¹ Edict. Conrad II (Pertz, ii. 39); Constit. Fred. I (Pertz, ii. 114). See also Cujacius, *De Feudis*, lib. i. tit. i., &c.; J. A. de Sancto Georgio, col. 299, &c. Even in Domesday Book, among the *Clamores* of Yorkshire (printed, vol. i. p. 374 a), William de Perci calls his peers to witness that he was seised of Bodetone, and held it, while William Malet was living and had the shrievalty of the county.

² *Registrum Brevium Originalium*, 1; Fitzherbert's *Natura Brevium*, 1-10.

³ Cap. 34.

CHAP. X. a remedy for an undertenant, without licence from the lord, would, of course, have been to deprive the lord's Court of its jurisdiction; and the Barons were evidently as anxious to preserve the courts held under them as to secure the right of themselves and others to judgement by peers.

In the latter the King's Courts (over which the *Curia Regis* or House of Lords retained control) had exclusive jurisdiction.

When the Common Bench was fully established as a distinct Court, it had exclusive jurisdiction (except in counties in which the Court of the Justices in Eyre was sitting). in all writs of *Præcipe in capite*, or Writs of Right, in which the demandant claimed to hold in chief, as of the Crown. It might consequently appear, at first sight, that undertenants suing in the Court of their lord, had the judgement of their peers, while the tenants in chief, or Barons, who were also equal among themselves, and Peers of the King's feudal Court, failed to secure the same privilege. All the King's superior Courts, however, were, as has already been shown, only offshoots of the original *Curia Regis*, to which the tenants in chief, or barons, owed suit, just as the undertenants owed suit to the Court of the Baron of whom they held. The original *Curia Regis*, or that part of it, which was in later times known as the Parliament, or House of Lords, always remained the Court of final jurisdiction. when any error was alleged in Courts below, and, for a very long period (as has been proved in another chapter) retained a hold upon them, and directed their course of proceeding when petitions were made to it during the progress of an action. It was also expressly provided in John's Great Charter¹ that amercements in Court should not be enforced against Earls and Barons except by their peers. Thus, although the pressing affairs of state, and the increase of legal business caused law proceedings in detail to be entrusted to special courts, those courts were subordinate to the higher jurisdiction of the suitors to the King's Court, or of the House of Lords. Matters affecting the Earls and Barons could therefore never be finally decided otherwise than by their peers, except

¹ Cap. 21.

through their own acquiescence in the decisions of a lower tribunal itself owing its origin to the King's Great Court. CHAP. X.

The idea of trial and judgement by peers, being strictly of feudal origin, had no direct relation to criminal offences, except in so far as they affected feudal rights by way of forfeiture. The idea itself, however, was familiar to the mind of every land-holder ; and, as treason and felony involved forfeiture or escheat, it was very natural that trial by peers should have been desired by tenants *in capite*. When the Great Charter was obtained from King John he had himself quite recently been cited, as Duke of Normandy, to appear before the King (Philip Augustus) and the Peers of France for felony committed in the murder of his nephew Arthur. He did not appear ; and sentence was passed against him that he should forfeit to his superior lord, the King of France, all his seignories and fiefs in that kingdom.

Feudal rights affected by forfeiture or escheat for Treason or Felony.

It is not necessary to enquire whether the action of the French Court of Peers was strictly in accordance with precedent ; it is sufficient to know that, just before King John granted his Great Charter, he had himself suffered not a little from the judgement of his peers. It can hardly be doubted that, when judgement by peers was mentioned in the Charter, the Earls and Barons interpreted it to mean that, in cases of alleged treason and felony, when forfeiture or escheat was involved, they should be judged only by Earls and Barons. Regarded from another point of view—from the point of view of the Sovereign in relation to the safety of the Crown—the doctrine of trial by peers in cases of treason was accepted only in a hesitating manner as late as the reign of Henry III. The King himself, said Bracton¹, cannot be judge, because he would then be prosecutor and judge in his own cause. Nor can the Justices, because in giving judgement they represent the person of the King. 'Who then shall judge? Without prejudice to any better

Earls and Barons to be judged by Earls and Barons, when disherison was in question, in the reign of Henry III.

¹ Bract. 119-119 b.

CHAP. X. opinion, it seems that the Court and Peers shall judge,' especially where, on the prosecution of the King, there is peril of life and member, or peril of disherison.

This judgement by Peers not identical with the later trial by Peers.

As soon as this doctrine was accepted, Earls and Barons could clearly be judged only by Earls and Barons¹. This judgement, however, was not identical with the trial by Peers of a later time, when the Peers not only pronounced sentence but found the accused Peer guilty or not guilty, and then gave judgement on their own finding. Bracton's only idea of the mode of accusation seems to have been that of an 'appeal.' Subject to certain preliminaries the question of guilty or not guilty was, in that case, decided by battle. The trial therefore, the ascertaining of the fact, was, though under the direction and control of the Court of Peers, by battle, but the judgement on the trial by battle was to be given by the Peers.

Courts differently constituted according to gradations in treason.

The definition of High Treason, or *Lese Majesté*, was at this time very vague. It was sometimes regarded as a felony, sometimes as a mere trespass, according to the gravity of each particular case. Even the treason-trespass had its degrees, and the lighter forms, as being punishable only by pecuniary fine, were excepted by Bracton from the necessity of judgement by Peers, and placed within the jurisdiction of the Justices. The graver forms, the punishment for which approached disherison. because apparently the transgressor's lands had to be redeemed from forfeiture, were placed in a middle position, and Peers were to be associated with the Justices in giving judgement².

Mode of trial still not settled in the reign of Edward II: Gaveston's case.

Though punishment of the most severe kind was inflicted for 'treason,' it was long before the definition of treason itself or the doctrine of trial by Peers made much advance towards precision. The troubled reign of Edward II afforded many instances of conspiracy against the King, and of

¹ According to the parallel passage in Britton (lib. i. cap. 23. sec. 8) it appears to have been thought that all appeals of High Treason against any persons should be heard by Earls and Barons in time of Parliament.

² Bract. 119 b.

execution for treason, but in the midst of arms laws are silent. CHAP. X.
 Piers Gaveston, the King's favourite, had already been twice banished and had twice returned. In the year 1311, a Committee of Lords, known as the Lords Ordainers, framed, among other articles, one to the effect that for having given bad advice to the King, and other alleged offences, he should as a public enemy be banished a third time from the realm, and, if found within the King's dominions after a day named, should be treated as a public enemy¹. He had had no trial, and no opportunity of defending himself. He did, however, return to England, was compelled to surrender while serving the King to the best of his power, and was afterwards beheaded². His death was desired by the great majority of the Earls and Barons, and advantage was taken of their general Ordinance to put him out of their way. This may have been a judgement, but certainly was not a trial by Peers. According to several accounts, the four Earls of Warwick, of Lancaster, of Hereford, and of Arundel, appear to have been concerned in the execution³. According to another account no peers at all were concerned in the final judgement. The Justices of Gaol Delivery appointed to deliver the gaol of Warwick, it is said, pronounced sentence in virtue of the Ordinance which they regarded as still in force. The beheading of Gaveston, it is added, the Peers of the Realm having been neither present nor even summoned, excited undying animosity between the King and the Earls⁴.

The case of Hugh le Despenser the elder, and Hugh le Despenser the younger had, in its early stages, some show of proceeding by due course of law, for the Prelates, Earls, Barons, and other Peers, together with the Commons, are

Banishment of the
Despensers
by Peers
of the
Realm.

¹ *Rot. Parl.*, 5 Ed. II, no. 20 (printed, vol. i. p. 283).

² Trokelowe, *Annales* (Rolls Series), p. 77.

³ *Annales Londonienses de tempore Edwardi Secundi* (Rolls Series), p. 207; *Annales Paulini* (Rolls Series), p. 271; *Vita Edwardi Secundi*, Auct. Malmesb. 179-180 (Rolls Series); *Vita et Mors Edwardi Secundi* (Rolls Series), p. 298. See also Murimuth (Rolls Series), p. 17.

⁴ *Gesta Edwardi de Carnarvan* (Rolls Series), pp. 43-44.

CHAP. X. represented as having framed the accusation. The 'Earls and Barons and other Peers of the Realm' found 'by examination,' though in the absence of the persons accused, that the alleged misdeeds of the Despensers (nearly of the same nature as those of Gaveston) were notorious and truly alleged. The 'Peers of the Realm, Earls and Barons,' in the King's presence, passed sentence of disherison and banishment, adding that, if found in the kingdom after the day appointed for their departure, the Despensers were to be treated as enemies of the King and of the kingdom¹.

The Earl of Carlisle degraded, and then sentenced as a traitor, without trial or judgement by Peers.

The case of Andrew Harcla, Earl of Carlisle, was very different from those of Gaveston or the Despensers, because the King himself regarded Harcla as a traitor, while the charges against the others proceeded only from those who were opposed to the King's party, and could hardly be described as treason against the King. The accusation against Harcla was that of treasonable correspondence with the Scots who were the King's enemies. He was not, however, judged by his peers, but by a Court constituted by special commission, and consisting of Edmund, Earl of Kent, the King's uncle, John de Hastings, also the King's kinsman, three knights, and the Chief Justice of the King's Bench. The commission which they received was not to try him, but to degrade him from his rank and pronounce judgement on him after degradation, in the terms of the instructions sent to them, for enmity to the King, and sedition. His guilt was established by the simple formula that his misdeeds were 'notorious and acknowledged in the realm; and our Lord the King records the fact.' His sword of earldom was accordingly taken from him, and his spurs cut away from his heels, and when he had been thus deprived of his dignity, the sentence for treason in all its horror was passed upon him².

As Harcla was degraded first, and underwent judgement for treason afterwards, it may be maintained that he was

¹ *Rot. Lit. Claus.*, 14 Ed. II, m. 14, *Cedula (Statutes of the Realm, i. 184)*.

² *Placita coram Rege*, Hilary, Rex, R^o. 34 d.

not judged as an Earl, and consequently that he was not, as an Earl, entitled to trial or judgement by Peers. It must, however, be obvious that, if the King could at his pleasure, or by recording any statement as being notorious, degrade a Peer from his peerage, the right of trial or judgement by Peers would be nugatory. CHAP. X.

The banishment of the Despensers was, in fact, but the triumph of the political party opposed to them. This was very speedily followed by their return, and by a reversal of the sentence against them¹. Soon afterwards the Earl of Lancaster, who was at the head of the opposite faction, fell in his turn into the hands of the King's party, and was sentenced to die the death of a traitor (drawing included); but, being of the blood royal, he was only beheaded. There is little doubt but that he had been in treasonable correspondence with the Scots; and he was taken when in arms against the King. From York he was carried to Pontefract where the King was, and on the following day he was brought to judgement. There was no time for any strictly formal proceedings even of the nature of a Court Martial. Some peers were present; his misdeeds were 'recorded' and judgement was pronounced. He was not even allowed to say a word in defence². Case of the Earl of Lancaster.

At the end of the reign, when the King's cause was lost, the Despensers had the misfortune to be taken by their enemies. Each was adjudged to suffer the full penalties of treason, the younger a little after the elder. Neither was allowed to say anything in his defence. Their previous banishment (though the sentence had been annulled) and their return to the realm, as well as their subsequent acts, were alleged as the causes of the judgement now given against them. The Court by which they were sentenced appears, in each case, to have consisted of Earls and Barons. The Despensers sentenced to death, a 'Knight' presiding in the Court.

¹ *Rot. Parl.*, I Ed. III (*Petitions in Parl.*), no. 1 (printed, vol. ii. p. 7).

² *Ib.*, I Ed. III, no. 1 (printed, vol. ii. pp. 2-3); *Annales Paulini* (Rolls Series), pp. 302-3; *Gesta Edwardi de Carnarvan* (Rolls Series), p. 77; *Auct. Malmesb.* (Rolls Series), pp. 270-271.

CHAP. X. It used as its mouth-piece William Trussel, who is described as a knight, and who was appointed Justice for the occasion. He performed some of the functions which would, at a later time, have been performed by the Lord High Steward, as President of the Court¹, but there is no evidence that any William Trussel had, so early as the reign of Edward II. been summoned among the Barons or other Peers to Parliament. He was, however, probably the William Trussel who, soon afterwards pronounced the deposition of Edward II.

Cases of the Earl of Kent, and of Mortimer: judgement but not trial by Peers.

It is, indeed, clear that as each faction obtained the mastery, it took revenge upon its opponents; and as the lands of traitors were forfeited for treason and could then be granted to others, there were excellent grounds for passing judgement, but none for a fair and impartial trial. As at the end of the reign of Edward II, so at the beginning of the reign of Edward III, the political party which proved itself the stronger wrought its will, in turn, upon the lives and lands of its principal adversaries. The Earl of Kent was treacherously inveigled by the emissaries of Roger Mortimer, Earl of March, into an undertaking for which he suffered death and forfeiture as a traitor; and Mortimer himself was not long afterwards drawn and hanged for treason, by the judgement of Earls and Barons, as Peers and Judges of Parliament². In each case it may be said that judgement was given by the Peers: but in each case the judgement was a foregone conclusion, and depended solely upon the will of a party. Each party said that the misdeeds of the other were 'notorious,' and notoriety sufficed in place of any trial in due form. Each party in its turn reversed, when triumphant, the attainders which its members had suffered in times of adversity.

No clear distinction

At this period (at the end of the reign of Edward II and

¹ *Annales Paulini* (Rolls Series), pp. 317-320; *Gesta Edwardi de Carnarvan* (Rolls Series), pp. 87-89; *Auct. Malmesb.* (Rolls Series), p. 289; *Vita et Mors Edwardi Secundi* (Rolls Series), pp. 311, 312.

² *Rot. Parl.*, 4 Ed. III, no. 1 (printed, vol. ii. pp. 52-53), nos. 11 and 12 (printed, vol. ii. p. 55).

the beginning of the reign of Edward III) it is plain that neither the doctrine of judgement by Peers, nor the doctrine of trial by Peers, had been reduced to any precision. The different modes of proceeding recognized in later times were not yet distinguished from each other. There was no clear discrimination between the course to be adopted when the accusation took the form of indictment, and that to be adopted when it took the form of impeachment. Bill of Attainder was not clearly marked off from impeachment; and impeachment was not as yet even a technical term, but was used for any kind of accusation. No case (so far as is known) had hitherto been tried by the Peers in the Court of the Lord High Steward.

CHAP. X.

between proceedings on indictment, on impeachment, and by Bill of Attainder, when Edward III ascended the throne.

It is nevertheless in this troubled period, 'when Judgement by Peers' was a phrase in common use, when trial by Peers had yet no settled form, and when the Statute of Treasons had not yet become law, that the right of the Spiritual Lords to trial by Peers is, if anywhere, to be sought.

Trial of Spiritual Lords.

Much has been written on the subject in later times, but it is by no means clear that the Prelates, though, as we have seen, allowed to be Peers of the Realm, had hitherto claimed that Peers of the Realm should try them or be their judges in accusations of treason or felony. still less in accusations of any other kind. It is quite certain that since the Conquest they had persistently attempted to render themselves exempt from all lay jurisdiction. In the reign of the Conqueror, Odo, Bishop of Bayeux, asserted the clerical privilege, saying, 'I am a clerk and minister of the Lord; it is not lawful to condemn a Bishop without the judgement of the Pope.' The Conqueror took the matter into his own hands, and condemned him not as a Bishop but as an Earl, because he was Earl of Kent¹. This, however, did not settle the question of clerical privilege, or prevent its re-assertion in subsequent reigns. In the reign of Henry II Becket refused to abide by the

From the time of the Conquest they had attempted to escape from lay jurisdiction: instances.

¹ Ordericus Vitalis (French Hist. Soc.), p. 189.

CHAP. X. jurisdiction of the King's Court in a matter of account. The Barons adjudged that he ought to be taken and imprisoned. Two Earls went to announce the fact to him, and he said, 'I forbid you, on the part of Almighty God, and under *anathema*, from rendering judgement on me this day, as I have appealed to the presence of the Lord the Pope¹.' In the reign of Richard I it was adjudged, in the King's Council or Court at Northampton, that Hugh de Nunant, Bishop of Coventry, should be peremptorily cited to answer for acting in a manner contrary to the fealty which he had sworn. It was further adjudged that, should he fail to appear within forty days, he should be subject to the judgement of the Bishops in that he was a Bishop, and to the judgement of laymen in that he had been the King's Sheriff². He had in fact been Sheriff of the counties of Warwick and Leicester in the second, fourth, and fifth years of the reign³. As an officer, therefore, he was regarded as being subject to lay jurisdiction, though not apparently of necessity that of Earls or Barons; and as a Bishop he was regarded as being subject only to ecclesiastical jurisdiction.

Doubts in
the reign of
Henry III.

In the time of Henry III Bracton expressed himself with doubting words to the effect that no clerk, of high or low degree, could be outlawed, and he mentioned a Bishop as having the exemption. The reason was that they could have compurgation in Court Christian. If a Bishop could not be outlawed upon an accusation of High Treason, after having fled, it would seem to follow that he could not have any judgement pronounced upon him in any secular Court. Bracton, however, carefully guarded himself by saying that the doctrine as to outlawry was only the opinion of 'some persons⁴.' Men were therefore still in some uncertainty as to the law.

¹ Hoveden (Rolls Series), vol. i. pp. 224-228.

² *Ib.*, vol. iii. p. 242.

³ *Great Rolls of the Exchequer* of the respective years under the head of Warwickshire and Leicestershire.

⁴ Bract. 134 b.

Soon after the accession of Edward II Walter Langton, CHAP. X.
 Bishop of Coventry and Lichfield, was accused of having Langton,
 Bishop of
 Coventry
 and
 Lichfield,
 tried before
 Justices of
 Oyer and
 Terminer.
 committed various offences while holding the office of
 Treasurer in the previous reign. According to one instru-
 ment he had presumptuously usurped power, under colour
 of his office, and effected sales, alienations, and waste of the
 King's lands, to the disherison of the Crown, and in deroga-
 tion of the King's royal estate¹. According to another
 document he was further accused of intolerable injuries
 and oppression, inflicted by means of certain conspirators
 and others who were his adherents². Special Commissions
 of Oyer and Terminer issued for hearing and determining
 the charges. None of the Commissioners were Peers. They
 were Brabazon, Chief Justice of the Court of King's Bench,
 Hengham, or Hengham, Chief Justice of the Court of Common
 Pleas, Bereford, a Puisne Justice of the latter Court, and
 William Inge, afterwards also a Puisne Justice of the same³.
 No question as to trial by Peers arose. Neither the word
Treason nor the word *Felony*, it is true, is mentioned in either
 form of accusation. The charges, however, bore a very strong
 resemblance to some of those brought in the following reign
 against Archbishop Stratford, who, it has been sometimes
 asserted, successfully claimed the right of trial by Peers.
 That claim will be considered in another place. In the
 meantime it may suffice to note that Langton was thrown
 into prison⁴, and was released only on the interposition
 of the Pope⁵. Thus, like his predecessor in the see, Hugh
 de Nunant (though the ecclesiastical power may have saved
 him as a Bishop), he was, as the King's officer, regarded as
 being amenable to the jurisdiction of the King's Justices.

The privileges of the clergy were declared and confirmed Benefit of
 Clergy in
 9 Edward
 II.
 in the ninth year of the reign of Edward II. It was then
 beyond all doubt the law that an ecclesiastic should not

¹ *Rot. Lit. Pat.*, 1 Ed. II, part i. m. 8 d.

² Also *Rot. Lit. Pat.*, 1 Ed. II, part i. m. 8 d.

³ The two patents as above.

⁴ *Annales Paulini* (Rolls Series), p. 257.

⁵ *Ib.*, p. 264.

CHAP. X. receive judgement before any secular judge in relation to any matter by which he could be brought into peril of life or member¹. High treason, above all other crimes, involved peril of life and member ; but it seems to have been supposed, even before the passing of the Act, and it was certainly held in later times, that privilege of clergy did not extend to cases of high treason².

Case of
Adam de
Orleton,
Bishop of
Hereford.

The case of Adam de Orleton. Bishop of Hereford, also in the reign of Edward II, is perhaps the first in which there is any authoritative account in detail of proceedings against a Prelate accused of felony and high treason. The whole course of action against him is of a very remarkable character.

The Com-
mission to
enquire,
and in-
dictment.

The King³ directed a writ to the Justices of the King's Bench⁴, which was of the nature of a Commission of Oyer and Terminer. They were to enquire in various counties as to felonies, robberies, trespasses, meetings, conspiracies, and confederacies lately moved against the King by his enemies who had rebelled against him. The word 'Treason' was not mentioned in the instrument, but in an Inquisition which was taken in virtue of it, the Jurors presented that Roger de Mortimer the nephew, and others, with a numerous army of horse and foot, levied war against the King. Mortimer, they said, held a secret conference with the Bishop of Hereford, who on the following day sent some of his own men-at-arms to reinforce the rebel army, with which they marched towards Gloucester, committing various trespasses against the King and people.

Orleton
refuses to
answer in
the King's
Bench.

Upon this indictment the Bishop was 'attached.' He appeared in the Court of King's Bench on January 23, 1323-4, and being asked by the Justices how he would acquit himself, he said that he was Bishop of Hereford, at the will of God and of the Pope, that the matters charged against him were of so high a nature that he ought not to.

¹ Stat. 9 Ed. II (*Articuli Cleri*), cap. 15.

² 2 Inst. 634.

³ *Placita coram Rege*, Hilary, 17 Ed. II, R^o. 87.

⁴ '*Justiciariis ad placita coram nobis tenenda assignatis.*'

answer in that Court, and that he could not answer without offence to God and Holy Church. He was thereupon required to appear in person from day to day to hear judgement. CHAP. X.

The record contains no mention of any intermediate days, but on the following 24th of February the Bishop 'came before the Lord the King himself in full Parliament.' The whole matter was recited in his presence and that of the 'Earls, Barons, and other the King's lieges.' It was also recited that Roger de Mortimer had already been adjudged a traitor for having seditiously levied war against the King, and that one of the men-at-arms sent by the Bishop to aid him had already been found guilty of treason. The Bishop was then asked whether he had anything more to say than he had previously said, and he replied as before that, being Bishop of Hereford, he could not answer without offence to God and Holy Church. The Archbishop of Canterbury thereupon made a demand that the Bishop, as being one constituted in the episcopal dignity, should be delivered to him. This was conceded, but the Archbishop was required to produce the Bishop in the Court of King's Bench on the Monday next before Mid-Lent, for which day the Sheriff of Hereford was to summon a jury. Refuses to answer in Parliament, because a Bishop: case remitted to the King's Bench.

The Archbishop, the Bishop, and the jury, of whom five were knights, came into Court on the appointed day. The jury found not simply a verdict of 'guilty' or 'not guilty,' but a verdict against the Bishop which followed the words of the indictment. Judgement was given that the Bishop should remain in the custody of the Archbishop as a Clerk Convict, and that his goods and chattels, lands and tenements, should be seized into the King's hand. Is convicted by a jury, but has benefit of clergy.

The Bishop of Hereford, when arraigned in the King's Bench, thus claimed no privilege of peerage, but only privilege of clergy. Then followed that which is common enough in the civil causes of the period—a reference to the King in Parliament on a point of difficulty, the cause still remaining to be determined in the Court of first instance, into which it was afterwards remitted for trial by a jury. Nothing

CHAP. X. was decided in Parliament, except that in this particular case Orleton should have his clergy¹.

Inaccurate
account of
the matter
sent to the
Pope.

The King (or rather, perhaps, as may be inferred from the style, some ecclesiastic on his behalf) afterwards wrote to the Pope, giving an account of the matter which is not strictly in accordance with the authoritative records of the Court of King's Bench. He said that Orleton 'had taken part with others in the crime of High Treason, and that the whole of the facts had been made clear not by fleeting or merely assertive rumour, but by lawful process in full Parliament, in the presence of Archbishops, Bishops, Nobles, and other Magnates of the Realm, according to the law and custom thereof.' The King also took credit for having dealt leniently with the Bishop, saying, 'although we might have proceeded against him more rigorously, yet, by reason of reverence for the episcopal order, we left him to be judged, in respect of the crimes aforesaid, *in foro ecclesiae*.'²

The letter is not without value in relation to the subsequent attitude of Stratford, as stated by ecclesiastics rather than by lawyers. It contains the positive, if not true, assertion that the whole case against Orleton was heard in Parliament. It suppresses the fact that the verdict against him was found by a jury in the Court of King's Bench, and that the judgement was pronounced in that Court by the Justices without the assistance of any Peers whatever. Taken by itself it might seem to show that the Bishop of Hereford obtained that trial by Peers, which he not only never claimed, but which he distinctly refused.

At the beginning of the following reign a petition was

¹ Sir Edward Coke (2 Inst. 634) has cited Orleton's case in proof of the doctrine that there was, at common law, no benefit of clergy in cases of High Treason. He was misled, as to the facts, as others have been since, by an account of the matter, written long after the event, by Walsingham, and has thus put the case :—'Because he could not have any privilege of clergy by the common law, the Archbishops of Canterbury, York, and Dublin, and their Suffragan Bishops came to the bar, in that disordered time, and with force took him from the bar, all which was done by pretext and colour of the canons of the Church.'

² French and Roman Roll, 15-18 Ed. II, m. 1.

addressed, on behalf of the Bishop, to the King and Council, complaining that the judgement which had been given against him in the Court of King's Bench was erroneous. The proceedings which followed, though in themselves remarkable, do not indicate that the question of trial by Peers was raised. They were held before the King and Council, Prelates, Earls, Barons, Magnates, and the whole commonalty of the Realm¹. The reversal of judgement, which followed, thus partook more of the nature of later Acts, in which Attainders were reversed, when one political faction succeeded in overpowering its previously triumphant rival, than of proceedings upon a writ of error in the House of Lords. Several minor technical points are found among the assignments of error, but the principal was that the articles under which the Justices of the King's Bench were to enquire, though extending to felony and robbery, did not include the levying of war. In another document² much is made of the fact that the Bishop was convicted by a jury, though he had not accepted that mode of trial. As has already been shown, however, the Bishop refused to put himself upon the country, because he claimed the privilege not of peerage but of clergy; and there was no irregularity in taking an 'inquest of office' in such a case. Nowhere is it stated that the jurisdiction of the Court of King's Bench was called in question on the ground that Orleton was a Peer of the Realm. When the judgement was reversed, no reasons were given. For all that appears, therefore, it may have been held as law, in the reign of Edward II, that a Bishop might be arraigned for felony in the Court of King's Bench. and might there plead, and be tried by a jury, if, at any rate, he did not himself claim to be tried as a Peer.

CHAP. X.

The judgement reversed by Parliament in the reign of Edward III, but without reference to any question of trial by Peers.

It is clear that the doctrine of trial by Peers had not, at this time, been reduced to precision even with respect to

The Peers object to giving

¹ *Rot. Lit. Pat.*, 3 Ed. III, part i. m. 33, and see *Rot. Parl.*, ii. App. 427.

² *Rot. Lit. Claus.*, 1 Ed. III, part i. m. 13, '*licet idem Episcopus in inquisitionem aliquam inde faciendam se non posuisset.*'

CHAP. X.
judgement
on any but
Peers.

laymen. By the King's special desire, the case of Simon de Bereford was brought before the Peers in the fourth year of the reign of Edward III. He was accused of being implicated in the treasons of Mortimer. They protested because he was not their peer; but in consideration of the supposed enormity of his crimes they did, in the end, entertain the charge and give judgement. It was, nevertheless, then 'assented and agreed by our Lord the King, and all the Magnates, in full Parliament, that although the Peers, as judges of Parliament, have taken upon them, in the presence of our lord the King, to make and render the said judgement, yet the Peers that now are or shall be in time to come, are not bound or charged to give judgement upon others than Peers,' and that this particular judgement was not to be drawn into a precedent¹.

As, however, will be shown in due course, the Lords, at no very great distance of time afterwards, enunciated a directly contradictory principle. The unsettled state of the practice, as well as some other circumstances, must therefore be borne in mind when the important case of John de Stratford, Archbishop of Canterbury, is considered.

Case of
John de
Stratford,
Arch-
bishop of
Canter-
bury: he
refuses to
go to the
King when
summoned.

Stratford had, as Chancellor, enjoyed the confidence of King Edward III. The King being subsequently engaged in a war with France, had the mortification to find that his affairs did not prosper, and that his plans were frustrated by the want of supplies. He attributed his misfortunes to the malversation of the officers of various departments. He returned suddenly and unexpectedly to England, on November 30, 1340², threw a number of persons, many of high position, into prison, and caused various commissions, of the nature of Commissions of Trailbaston³, to issue for full inquiry regarding the misdeeds which he suspected. One of his first acts was also to summon the Archbishop to his presence. He seems to have attributed a part of his ill-

¹ *Rot. Parl.*, 4 Ed. III, no. 2 and no. 6 (printed, vol. ii. p. 53 and p. 54).

² *Rot. Lit. Pat.*, 14 Ed. III, part iii. m. 11.

³ *Ib.*, 14 Ed. III, part iii. m. 2 d, and m. 8 d.

fortune to Stratford's negligence in not having paid certain sums, as bound, to foreign merchants. Nothing, however, could induce the Archbishop to obey the King's commands. A safe conduct was sent to him¹, but still he refused to appear except in Parliament². Up to this point, at any rate, there was no charge of treason distinctly formulated against him, though it is not improbable that some of the King's courtiers may have called him a traitor.

He began, however, to make very free use of the ecclesiastical weapon of excommunication, including in that sentence, somewhat vaguely, all laymen who should lay violent hands on the persons, lands, goods, or houses of clergymen, all who should violate the liberties of Holy Church, all who should lessen the privileges granted to the Barons in *Magna Charta*, all who should falsely accuse him or any Bishop or person of his Province of treason, or any other crime³. At the same time he suggested that the Prelates, Peers, and Nobles of the Realm should be summoned and make strict enquiry as to what had become of the supplies voted, and that no one should be deemed guilty of wrongdoing until his answer had been given and due investigation had been made.

His excommunication.

The Commissions of Trailbaston, or other Oyer and Terminer, everywhere unpopular, incurred the special animosity of the clergy and of Stratford at their head. Several persons in orders had been imprisoned, and proceedings had been taken against them at the same time as against Chief Justice Willoughby⁴. Stratford was especially indignant on this ground, and prayed the King and Council to release all free men taken and detained in contravention, as he said, of *Magna Charta*, but especially the ecclesiastics⁵.

A great quarrel now arose between the Archbishop and

The King declares

¹ *Rot. Lit. Pat.*, 15 Ed. III, part i. m. 48 (printed in Rymer's *Foedera*, ii. 1146).

² *Rot. Rom.*, 15 Ed. III, m. 4 (printed in Rymer's *Foedera*, ii. 1152-3).

³ Hemingb. (English Historical Society) ii. 375-380.

⁴ *Rot. Lit. Pat.*, 14 Ed. III, part iii. m. 2 d.

⁵ Hemingb. ii. 369-371.

CHAP. X. the King. The clergy, at Stratford's instigation, threw every possible obstacle in the way of the Justices of Trailbaston, by denunciations, monitions, and sentences of excommunication, and by inhibiting the Justices from putting persons upon their oath during Lent¹. The King expressed his views with regard to the course pursued in a letter sent to the Bishop of London for publication. Reciting the original ground of complaint, he went on to the sentences of excommunication, designed, as he said, 'to impair the good opinion held of the King . . . and traitorously to stir up sedition among the people committed to our charge, and finally to withdraw from our Royal Majesty the hearts of our Earls, Lords, and Barons of our Realm.' At the same time the King made various charges against Stratford of misapplication of public funds².

The Archbishop declares that, if accused of Treason, he denies the jurisdiction of any secular judge.

The Archbishop, thereupon, took up new ground. He had previously been willing to appear in full Parliament, and submit himself to the judgement of his peers, with a saving for the state of Holy Church, for himself, and for his Order, and had suggested that, as no Parliament was sitting, a Parliament should be summoned³. He now changed his tone, and showed very plainly what was meant by the saving clause for himself, his order, and the Church. He wrote a letter to the King beginning thus:—'There are two things by which the world is chiefly governed, the Holy Pontifical Authority, and the Royal Power. . . . Who doubts but that the Priests of Christ ought to be considered both fathers and *masters* of Kings and Princes?' He made a lengthy answer to some of the charges against him. In relation to the particular and later charge of stirring up sedition, however, he said that inasmuch as it seemed to cast the crime of treason upon his head, in which no King

¹ *Rot. Lit. Claus.*, 15 Ed. III, part i. m. 40 d (printed in Rymer's *Foedera*, ii. 1151-2).

² *Ib.*, 15 Ed. III, part i. m. 46 d (printed in Rymer's *Foedera*, ii. 1147-8).

³ MS. Cotton. Claud. E. 8. fo. 252 a (printed in Rymer's *Foedera*, ii. 1143); Hemingb. ii. 363-367.

or temporal Lord could be his competent judge, he did not intend to prejudice his position, 'but wholly to refuse the judgement of any secular judge whatever¹.' CHAP. X.

In March, 1340-1, the King summoned a Parliament to meet at Westminster on the Monday next after the Quinzaine of Easter (April 23), and the Archbishop received his summons in due course². The events which then occurred have been represented in an impossible fashion by Birchington, a monk who wrote some forty years after the event, and whose statements have again and again been copied into various histories. Birchington states that on the morrow of St. George's day (April 24) the Archbishop came with the intention of making his way to his place in Parliament, but was met at the entrance door of the Great Hall by Stafford, the Steward of the King's Household, and Darcy, the King's Chamberlain, who told him that he must answer, in the Exchequer, all that should there be objected against him, before he could enter Parliament. Stratford, as alleged, did then go into the Exchequer, where certain articles were tendered against him, which he said he would consider. He then, still on April 24, went into Parliament, and said he would clear himself in full Parliament of the charges laid against him. Afterwards, as the monk tells us, Stratford appeared a second time in the Exchequer³. On Thursday, May 3 (*in Festo Inventionis Sanctae Crucis*), several persons interceded on behalf of the Archbishop with the King, who

¹ The Archbishop's reply is given by Birchington (*Anglia Sacra*, part i), p. 34, whence it has been copied into Parker's *De Antiquitate Britannicae Ecclesiae*, and thence into Wilkins's *Concilia*. Birchington is not an authority to be trusted when stating matters in his own words, but there is no reason to suppose that the text of Stratford's letter was not preserved at Canterbury and copied by the monk.

² *Rot. Lit. Claus.* 15 Ed. III, part i. m. 37 d (printed, *Rep. Dig. Peer*, vol. iv. p. 529). The Quinzaine of Easter is sometimes represented as being the period of fifteen days including Easter Day, seven days before and seven days after it. The Quinzaine is, however, usually the fourteenth day after the Feast or Saint's Day named. In the year 1341 Easter Day fell on the 8th of April.

³ Birchington (*Anglia Sacra*, part i), pp. 38-39.

CHAP. X. thereupon received him into favour, and held him to be in every respect free from the charges laid against him ¹.

Stratford, according to the Rolls of Parliament, asked to be arraigned before the Peers, because he was 'notoriously defamed.'

With regard to that which really happened in Parliament, the Parliament Rolls themselves constitute the only trustworthy authority; the Rolls of the Exchequer constitute the only trustworthy authority for that which happened in the Court of Exchequer. From the Rolls of Parliament it appears that on Monday, a fortnight after the first meeting of the Parliament (May 7), the King came into the Painted Chamber, whither came also the Archbishop of Canterbury, the other Prelates and Magnates, and the Commons. Stratford there humbled himself before the King, and prayed the King to grant that, inasmuch as he was notoriously defamed throughout the realm, he might be arraigned before the Peers in full Parliament, and there answer. To this the King, in a manner, consented, adding that he wished business touching the state of the realm and the common weal to be first set in order, and other business afterwards ². Two years later the King commanded that all matters touching the arraignment of the Archbishop should be annulled and set aside, as being neither reasonable nor true ³. Thus the statement that on May 3, 1341, the Archbishop was held to be innocent of the charges brought against him, is absolutely devoid of foundation. He was not held innocent on that day, or on any day in the year 1341, or before the year 1343.

Statements of later historians that Stratford had first appeared, on a charge of Treason, in the Exchequer.

The story relating to the Exchequer, absurd enough as told by Birchington, deserves, perhaps, more attention, from the extraordinary proportions which it assumed in later times, and in other hands. Always acquiring strength in its progress, it affected the writings of Bishop Stillingfleet, of Jeremy Collier, of Hume, of Hallam, and of more recent historians. Hallam, in one of his prominent notes ⁴ relating to the question 'whether Bishops are entitled. *on charges of*

¹ Birchington (*Anglia Sacra*, part i), pp. 40-41.

² *Rot. Parl.*, 15 Ed. III, no. 8 (printed, vol. ii. p. 127).

³ *Ib.*, 17 Ed. III, no. 22 (printed, vol. ii. p. 139).

⁴ Hallam, *Middle Ages*, cap. 8. part iii. note 1.

treason or felony, to a trial by the Peers,' has, in reliance upon Collier (who in his turn relied upon Birchington), committed himself to the following very remarkable statement. The Archbishop 'came to Parliament with a declared intention of defending himself before his Peers. The King insisted upon his answering in the Court of Exchequer.' Collier (who is Hallam's authority) further states that Stratford actually did appear there, 'received a copy of the charge, and promised to return his answer after time for considering the articles'.¹

This is a truly astounding proposition. Stratford, who, be it remembered, is set up by Stillingfleet, Collier, and Hallam as the great vindicator of the right of Bishops to be tried by Peers of the Realm, goes meekly to the Court of Exchequer and recognizes its jurisdiction, when, according to his own showing, it is a charge of High Treason which is brought against him. He then goes back to Parliament as champion in a struggle in which he had already surrendered, and most needlessly surrendered too.

It seems hardly necessary, in these days, to say that Stratford never did anything of the kind. The whole story about the Exchequer arose out of a monkish ignorance of law, and the idle gossip of a monastery. That which actually did occur can be ascertained, not from Collier or Birchington, but from the contemporary Exchequer records, which show that Stratford did not appear in person in the Exchequer at all.

The Exchequer was a Court of Revenue and Account. The matter in respect of which the Archbishop had to make an 'appearance' (which does not necessarily mean a personal appearance) in the Exchequer was not High Treason, or any bond to foreign merchants, but something very much more prosaic. Reduced into the actual words of the Exchequer it is neither more nor less than fifteen sacks, and fifty-seven pounds of wool, which were alleged to be due from him to the King 'in respect of the wools

CHAP. X.

The Exchequer had, in fact, no jurisdiction in Treason.

The origin of the story.

The Rolls of the Exchequer show that Stratford merely appeared there, in relation to a trivial matter of account, by attorney.

¹ Jeremy Collier, *Ecclesiastical History* (1852), vol. iii. p. 89.

CHAP. X. lately granted by the Prelates, Religious, and certain others of the clergy' in the Parliament of the twelfth year of the reign¹. The proceeding was not even, as has sometimes been said², by information of the Attorney-General, or by bill, or by any of the peremptory measures which the Exchequer, in later times, at any rate, had at its disposal. There was not, at this time, in the exact modern sense, any Attorney-General in existence. The Archbishop was called to the Exchequer by the mildest of its processes a *Venire facias*³. To this he omitted to appear, as defendants commonly did in all the Courts upon receipt of a first writ.

In due course a writ of attachment afterwards issued to ensure the Archbishop's attendance. He then appointed an attorney, Elias de Waddeworth⁴. 'And the Archbishop, by *Elias de Waddeworth, his attorney*, comes and says that he can sufficiently show to the Court that he ought not to be charged with the wools, but says that he has not his evidences ready, and prays to have a further day prefixed for him.' The prayer is granted, and successive adjournments follow⁵. During the whole of this time Stratford was appearing not in person at all, but by attorney, and fully recognizing the jurisdiction of the Exchequer with regard to the particular matters in dispute.

Further
pro-
ceedings
in Parlia-
ment.

The modern idea that Stratford 'was seized by officers and carried to the bar of the Court of Exchequer'⁶ having been traced to its source, and its true value having been ascertained, we may now follow some other proceedings in Parliament. In this part of the field a furious controversy raged in the seventeenth century, all because some of the

¹ *Remembrance Roll* of the King's Remembrancer of the Exchequer, Easter, 15 Ed. III, '*Adhuc Recorda*,' Kent.

² Lord Campbell, *Lives of the Lord Chancellors*, cap. 14.

³ *Remembrance Roll* of the King's Remembrancer of the Exchequer, *Brevia Retornabilia*, Hilary, 15 Ed. III.

⁴ *Remembrance Roll*, as above, '*Praesentationes Attorn.*, &c.'

⁵ *Remembrance Roll*, as above, '*Adhuc Recorda*.'

⁶ Lord Campbell, *Lives of the Lord Chancellors*, cap. 14.

combatants would not sufficiently attend to the Rolls of Parliament itself. CHAP. X.

Had Edward Stillingfleet (sometime preacher at the Rolls Chapel, and afterwards Bishop of Worcester) never been born, it is probable that the case of Archbishop Stratford would have attracted comparatively little attention, and that some eminent writers would have been saved from very remarkable errors. It is quite possible to have a smattering of records, and yet be ignorant of the law which they illustrate, quite possible to be clever in controversy and yet not infallible in argument, or even absolutely correct in statement of matters of fact.

These were brought into prominence by Bishop Stillingfleet in the seventeenth century.

Stillingfleet was an eager disputant, of strength, originality, and judgement, and met another of not less power, and, perhaps, of greater accuracy, in Lord Holles¹. It is not necessary to follow the arguments of the two champions, because both of them, in the heat of the contest, missed some of the most important points. It may, however, be of use to show how Stillingfleet deceived himself, and misled others who followed him. His knowledge of legal terms was defective, and for that reason, without doubt, he asserted that Stratford, who was not tried at all, was 'tried'² by the Peers. He made another statement that twelve Peers were appointed to examine the articles against the Archbishop, and then admitted that, according to the Parliament Roll itself, the twelve were not chosen for that purpose, but to draw up in form the wishes of the Peers in general as to a trial by their peers in Parliament³.

His statements were inaccurate.

The ideas of Stillingfleet were adopted by Jeremy Collier, a Non-juror, and a controversial writer on many subjects, including the immorality of the stage. He published in the early part of the eighteenth century 'The Ecclesiastical History of Great Britain.' It shows considerable research,

He misled Jeremy Collier and others

¹ See Lord Holles, *His Remains*, 1682.

² Selden inadvertently made the same statement in his *Judicature in Parliament*. (Works, vol. iii. part ii. 1588.)

³ Stillingfleet's Works, vol. iii. p. 856.

CHAP. X. but it is a *rudis indigestaque moles* abounding in statements made with the object of setting forth the particular ecclesiastical views of history which the particular ecclesiastical writer entertained. It is a book of absolutely no authority on matters of law, and exhibits, again and again, a complete ignorance of the meaning of the commonest technical terms. Reference to Collier's writings would indeed be needless, had his views not been accepted without question by later writers of more importance. He copies Stillingfleet's statement regarding the appointment of twelve Peers to examine the articles against Stratford, and then copies Stillingfleet's admission that the Rolls of Parliament afford no warrant for it ¹. He also tells us, in Stillingfleet's words, that the Archbishop was 'tried, at the King's suit, and for a capital crime, and yet not tried by commoners but by his Peers ².'

Stratford was never arraigned, much less tried, before the Peers.

As a matter of fact, Stratford was never even arraigned, much less tried, and it is not quite clear on what points he wished to be arraigned before the Peers. He asked it only because he was 'notoriously defamed through the realm.' Had he been arraigned, it would have been open to him to make any answer he pleased, and to make one answer with regard to one part of the charges, another to another. Any answer he might give he was, according to his own words, determined to make with a saving for Holy Church. for himself, and for his Order. To the charge of Treason he had distinctly said that he would not answer at all in any temporal court. So far as capital offences were concerned, he was clearly aiming not at trial by Peers but at exemption from all secular jurisdiction.

A committee, including Bishops, Earls, Barons, and Judges, appointed to report

The committee appointed to make a report on the general subject of judgement by Peers was constituted in relation rather to the far-reaching Commissions of Trailbaston, which had recently issued, than to the particular case of the Archbishop. As enquiry was to be made of misconduct in every department, charges might of course

¹ Jeremy Collier, *Ecc. Hist.* (1852), vol. iii. p. 90.

² *Ib.*

be made against Peers, and for this reason, perhaps, some Peers were nominated to act with other persons in these Commissions. The committee, however, did not, as is commonly represented, consist exclusively of Peers. It included four Bishops, four Earls, and four Barons, '*together with some Sages of the Law.*' Their instructions were 'to examine in what cases the said Peers should be bound to answer in Parliament, and in what cases not¹.'

CHAP. X.
on judgement by
Peers in
1341.

When the report was made, it had the authority of the twelve Peers, but all mention of the 'Sages of the Law' was significantly wanting. It was to the effect that 'Peers of the Realm ought not to be arraigned or brought to judgement but in Parliament and by their Peers.' Thereupon a new question arose—whether 'if any of the Peers be or have been Chancellor, Treasurer, or other officer whatsoever, this privilege should operate as well with regard to their office as in any other manner.' In relation to this point the Lords declared 'that all the Peers of the Realm, officers or others, ought not, by reason of their office, in respect of matters touching their office, or for any other reason, to be brought to judgement, to lose their temporalities, lands, tenements, goods, or chattels, or be arrested or imprisoned, outlawed, or forejudged, and ought not to answer or be judged otherwise than in full Parliament, and before the Peers, in cases in which the King is party, saving to our Lord the King the laws rightfully used by due process, and saving the suit of parties.' There was an exception, however, in cases in which any Peer had been Sheriff or other officer and had received money by reason of which he was bound to render an account. Then, the Peers said, their meaning was that any such Peer should come and account in the accustomed place (the Exchequer) either in person or by attorney².

The report
was made
without
the assent
of the
Judges: it
applied to
all cases
in which
the King
was a
party.

All this, be it observed, was only a report, not a judicial decision, or an Act of Parliament, and a report made without the expressed sanction of any of the expert members of

Protest of
the Chan-
cellor,
Treasurer,

¹ *Rot. Parl.*, 15 Ed. III, no. 6 (printed, vol. ii. p. 127).

² *Ib.*, 15 Ed. III, no. 7 (printed, vol. ii. p. 127).

CHAP. X. the Committee. There is no recorded protest on the part of the Sages of the Law at this stage, but it is clear from subsequent events that they dissented. The recommendations of the report were shortly afterwards embodied with other provisions in the instrument known as the Statute of 15 Edward III, Statute 1. It is stated in the Rolls of Parliament that all these provisions 'were made by the Magnates and Commons and shown to our Lord the King,' and that they 'were read before the King.' The Chancellor, however, the Treasurer, and some of the Justices protested that they did not assent to the making or to the form of the Statute, and that they could not observe the Statute if contrary to the laws and usages of the Realm which they were sworn to keep¹. The Sages of the Law, constituting, at this time, a portion of 'the King in his Council in his Parliament,' considered themselves entitled to a voice in the passing of Acts of Parliament, and did not consider that this particular Act was duly passed.

The Act
declared
null by the
King and
Council.

The King permitted the Statute to be sealed, though he subsequently said, in a not very dignified manner, that in so doing he dissembled. Shortly after the Act had passed, he took counsel with Earls, Barons, and learned men (the Sages of the Law who had already expressed their dissent), and with their advice and assent declared the Statute to be null. The grounds which he assigned were that its provisions were expressly contrary to the laws and customs of the Realm, that he had never agreed to its promulgation, and that any consent which he had given to it was not given of his own free will. He added, however, that any of the articles which had already been embodied in previous Statutes should be duly observed².

The protest made by the Judges and the action of the

¹ *Rot. Parl.*, 15 Ed. III, no. 42 (printed, vol. ii. p. 131).

² *Rot. Lit. Claus.*, 15 Ed. III, part ii. m. 1 d (printed in Rymer's *Foedera*, vol. ii. p. 1177). The instrument is also enrolled on the Statute Roll, and printed in the Statutes of the Realm, vol. i. p. 297. This repeal (15 Ed. III, Stat. 2) has not only been admitted into the Statutes of the Realm, but has itself been repealed by the Statute Law Revision Act, 1863.

King may have been prompted, so far as the particular enactment touching the Peers was concerned, by the idea that it went beyond the provisions of Magna Charta in its details. We have not now to consider whether, at this period, the King had the power with the consent of a Council to revoke, annul, or repeal an Act of Parliament. Two years later there was a more formal repeal in Parliament, which, it is to be presumed, had the consent of the Commons as well as of the Lords, since there is nothing to show the contrary. The words of repeal may be worth quoting. The Statute 'shall be wholly repealed and annulled and lose the name of a Statute, as being prejudicial and contrary to the laws and customs of the Realm, and to the rights and prerogatives of our Lord the King. But, for that some articles are comprised in the same Statute which are reasonable, and in accordance with law, it is agreed by the Lord the King and his Council that of such articles and others agreed in this present Parliament there be made a Statute anew, by the advice of the Justices and other learned men, and kept for ever ¹'

CHAP. X.

The Act formally repealed by Parliament.

No such new Statute, however, was made with regard to the trial or judgement of Peers. The Statute of 15 Edward III was ever afterwards treated by the lawyers as non-existent, and Magna Charta, as confirmed by Henry III, was always considered the statutory basis of the right of Peers to be tried by the Peers. In the reign of Henry VI, when the existing privileges in relation to trial by Peers were expressly extended to Peeresses, there was no mention of any Act except Magna Charta, the operative passage in which was quoted at length ². Staunford in his *Pleas of the Crown*, published in the sixteenth century, cites no authority for the principle except Magna Charta ³, and he has been followed by a long line of eminent men.

Magna Charta the only written law for the trial of Peers by Peers.

The whole of the Parliamentary events of the fifteenth and seventeenth years of the reign of Edward III serve to

As yet no settled principles

¹ *Rot. Parl.*, 17 Ed. III, no. 23 (printed, vol. ii. p. 139).

² Stat. 20 Hen. VI, cap. 9.

³ Staunford, *Les Plees del Coron*, lib. iii. fo. 152 B.

CHAP. X. show very clearly that the doctrine of judgement by Peers, though vaguely accepted in principle, had still not been reduced to any precise system. There is some mention of articles against Stratford, but no indication of any definite mode of procedure or of any particular charge. He was not indicted, he was not 'appealed,' and, in the later sense of the term, there is nothing to show that he was impeached. There was much talk of the judgement of Peers in full Parliament, but no indication that there could be a trial of a Peer in the Court of the Lord High Steward when Parliament was not sitting. If the committee of Lords had had their way, the effect would have been that all Crown cases in which a Peer was concerned (and not merely cases of treason and felony) would have had to be brought before the Lords in full Parliament. There can be no doubt that the lawyers did good service in opposing this pretension.

The Statute of Treasons in 1351.

It was not until the year 1351 (25 Edward III) that the crime of High Treason was defined by Act of Parliament¹. The Statute was, without doubt, in part declaratory, because there are mentioned in it offences which had previously been mentioned by Britton. The necessity of a definition, however, must have been felt at the time; and, until a definition had been given, the cases in which Peers were to be tried by their Peers could not all be specified with precision.

An Abbot, whose predecessor had been summoned to Parliament, tried for Treason in the King's Bench, and sentenced to death in 1357.

By the Statute of Treasons it was declared to be one of the forms of treason to counterfeit the King's coin, or to import counterfeit money. Six years after the passing of the Act, Ralph, Abbot of Missenden, was indicted for having traitorously and feloniously falsified and clipped the King's coin. His predecessors had been summoned in the forty-ninth year of the reign of Henry III to treat and advise with the other prelates and magnates. Representatives of the Commons were summoned at the same time, and the meeting was of the nature of a Parliament. It has been

¹ Stat. 25 Ed. III, cap. 2.

held that a summons to a lay Baron at this period, if proved, does not give any hereditary peerage to his descendants—possibly because, as there are no Rolls of Parliament of the period, it would be difficult, if not impossible, to prove that he actually sat. No Abbot of Missenden appears to have been summoned after the reign of Henry III, and, therefore, possibly none had the status of an Abbot holding in barony and liable to be summoned. Be that, however, as it may, the indictment of the Abbot Ralph was in the King's Bench. He was arraigned in that Court and asked how he would acquit himself of the charges. He pleaded Not Guilty, and put himself, for good or ill, 'on the country.' A jury thereupon found him guilty, and it was adjudged that he should be drawn and hanged¹.

In this instance it is clear that no question of trial by the Peers arose. It may be that, notwithstanding the Act, degrees in treason were still recognized, as in the days of Bracton. It may be that the Lords, who soon after claimed to judge of matters of great moment, did not regard a coinage case, though within the Statute of Treasons, as a matter of high national importance. It may be that for some reason, the later Abbots of Missenden were not liable to the burden or entitled to the privilege of a summons to Parliament. It is, nevertheless, perhaps worthy of note that the successor of an Abbot who had been summoned with other Prelates, Earls, and Barons was not tried and did not ask to be tried by the Peers.

The right which the Peers had claimed in the year 1331 to judge Peers and not commoners was practically renounced, or rather something higher was claimed, in the year 1387, when the Peers again came into conflict with the Sages of the Law. They then declared, with the King's assent, that where there had been any very high crime, touching the King's person and the state of all his realm, perpetrated by Peers of the Realm *with others*, the cause should not be

The Lords claim to judge Peers, *with others*, in crimes against the State, in 1387.

¹ *Placita coram Rege*, Mich., 31 Ed. III, R^o. 18 d.

CHAP. X. determined in any place but Parliament, nor by any other law than the law and course of Parliament. It belonged, they said, to the Lords of Parliament, and to their privilege and liberty of 'ancient time accustomed,' to be judges in such cases, and 'to judge thereof with the King's consent ¹.'

Appeal
Treason
against the
Arch-
bishop of
York, and
Peers, and
com-
moners.

This remarkable declaration arose out of the proceedings against Alexander Neville, Archbishop of York, Robert de Vere, Duke of Ireland, Michael de la Pole, Duke of Suffolk, Sir Robert Tresilian, Chief Justice of England, and Sir Nicholas Brembre, the last two of whom, though Knights, were not Peers of the Realm. They had been 'appealed' of 'high treasons committed by them against the King and his realm.' The appellors were Thomas Duke of Gloucester, Constable of England, Henry Earl of Derby, Richard Earl of Arundel and Surrey, Thomas Earl of Warwick, and Thomas, Earl Marshal. The King accepted the appeal, and assigned a day to the parties to take and receive full justice upon it at his first Parliament to be held at Westminster. By the advice of his Council he caused proclamation to be made through all the counties of England that all the persons appealed should appear on the day named in Parliament.

On the appointed day the appellors prayed, in the presence of the King and the Lords of Parliament, that the Archbishop of York, the Duke of Ireland, the Earl of Suffolk, and the Chief Justice, all of whom were at large, might be called to answer. They prayed that Brembre, who was in custody, might be brought before them. The Archbishop, Duke, Earl, and Chief Justice, when called, did not appear. The appellors prayed the King and the Lords of Parliament that they would record the default, and proceed to judgment thereupon. The King and Lords took time to deliberate until the morrow.

The
Judges and
lawyers
(including
civilians)
declare

At the same time the Justices and Sergeants, and others learned in the law of the realm, together with some learned in the civil law, were charged on the part of the King to give legal advice to the Lords of the Parliament. They all

¹ *Rot. Parl.*, 11 Ric. II, no. 6 (printed, vol. iii. p. 236).

deliberated and gave for answer that they had seen and well understood the tenour of the appeal, and that it was not made or affirmed in accordance with the order that either the law of the realm or the civil law required ¹.

CHAP. X.

the appeal to be not in accordance with law.

It may, perhaps, be not unprofitable to enquire why lawyers learned in the civil law were asked for their opinion as well as the King's Justices, and why they all agreed that the Appeal preferred by the Lords Appellors was not made in due course of law. The civilians were probably called in because some lawyers appear to have held that an Appeal of Treason, the ultimate trial of which was by battle, appertained to the jurisdiction of the Constable and Marshal, and because in this Court of Chivalry the proceedings before 'battle joined' were according to the civil law ². The authority of this Court, if really existing, was said to have been gained by gradual encroachment ³, and might therefore reasonably be a subject of doubt and dispute.

Reason for consulting the civilians: the Court of Chivalry.

The Lords, after consultation among themselves, made the declaration as to their right of judgement which has already been quoted. They added that the kingdom of England never heretofore was, nor, as they and the King were minded, ever should be ruled or governed by the civil law. A cause of such great moment as this appeal, they said, should never be tried in any place but Parliament, nor by the course, process, and order in use in any lower Court in the realm. All the lower Courts had but the execution of the ancient laws and customs of the kingdom, and of the Ordinances and Statutes of Parliament. It was therefore adjudged by the Lords, with the assent of the King, that the appeal was well and duly made and affirmed, and that the process was, according to the laws and course of Parliament, good and effectual.

The Lords, with the King's assent, pronounce the appeal good according to the laws and course of Parliament.

After an adjournment, the prayer that the default of the Archbishop of York, Duke, Earl, and Chief Justice might

The appeal proceeds in

¹ *Rot. Parl.*, 11 Ric. II, no. 6 (printed, vol. iii. p. 236).

² *Year Book*, Easter, 36 Hen. VI, no. 8. fo. 20.

³ Stat. 13 Ric. II, cap. 2.

CHAP. X. be recorded was renewed. The Archbishop of Canterbury, and the other Spiritual Lords withdrew (after asserting their right to be present as Barons) because matters were to be brought to discussion, at which the canons did not permit them to be present.

Sentences. The default was then formally recorded, and the appellors prayed judgement. The Temporal Lords pronounced that the Archbishop of York, the Duke of Ireland, the Earl of Suffolk, and the Chief Justice were Guilty of Treason, and passed sentence that they should be drawn and hanged. For want of precedent, however, further consideration was to be had with regard to the person of the Archbishop, whose execution was accordingly stayed. Tresilian was shortly afterwards taken, and brought into Parliament, and, having nothing to say in defence, was executed on the same day.

Trial by battle refused to one of the appealed, on the interposition of the Commons.

Sir Nicholas Brembre, who was already in custody, was brought up, and the articles of appeal were read to him 'in full Parliament.' He pleaded Not Guilty, and offered to defend by his body—that is to say claimed Trial by Battle. The Commons, however, interfered in this case. They said that what was alleged in the appeal was true, and that they would have made an accusation if the Lords had not made their appeal. It is not certain whether the Lords considered that the action of the Commons had the effect of converting the Appeal into an Impeachment, or whether they held that a commoner had no right to Trial by Battle against a Peer. For some reason, however, they decided that Trial by Battle did not lie in this case. They found Brembre Guilty, and gave judgement that he should be drawn and hanged.

Impeachments of Treason by the Commons heard by the Lords.

In the same Parliament the late Justices of the Court of Common Pleas, the Chief Baron of the Exchequer, and one of the King's Sergeants-at-law were impeached¹ of High Treason by the Commons. The Lords Temporal resolved that they would examine the matter and circumstances, and

¹ 'Accusez et empeschez,' *Rot. Parl.*, 11 Ric. II, no. 6 (printed, vol. iii. p. 240).

render thereon such judgement as should be to the honour of God, and the honour and profit of the King and his realm. In the end they found the persons accused Guilty, and passed judgement, but afterwards yielded to the prayer of the Archbishop of Canterbury and other Bishops, and remitted the sentence of death. Several other commoners were also impeached of Treason by the Commons, and among them some knights who pleaded Not Guilty, and said they would acquit themselves, as knights, in such manner as the Lords of Parliament should be pleased to adjudge. The Temporal Lords, after deliberation, simply found them guilty and passed sentence upon them. The Commons further impeached the Bishop of Chichester of Treason, and he also was found guilty by the Temporal Lords; but both he and the Justices whose lives had been spared were banished to Ireland.

After these cases had been decided the Lords Spiritual and Temporal again claimed as their liberty and privilege that matters of great moment (not simply treason or felony) touching Peers of the Realm moved in this or to be moved in future Parliaments, should be debated and adjudged only according to the course of Parliament, and not according to the civil law, or according to the common law of the land as administered in inferior Courts. The King allowed and approved the claim in full Parliament¹.

The Lords again assert their claim to judge in all matters of great moment affecting Peers.

The very instructive proceedings in this Parliament reveal, as in a mirror, the hopeless confusion which prevailed in the minds of all classes, except the lawyers, with regard to the definition of High Treason, and to the manner in which persons accused of it, whether Peers or commoners, ought to be tried. The House of Lords was now shaking itself free from the Council. In the previous reign the Chancellor and Judges had a voice and made it heard when the King sat 'in his Council in his Parliament.' The Judges, though still formally summoned, were now asked to give their opinions, not as having a right to

Diminished power of the Judges in Parliament.

¹ See the whole proceedings in Parliament, *Rot. Parl.*, 11 Ric. II, no. 6 (printed, vol. iii. pp. 229-244).

CHAP. X. sit and speak their minds in the House, but merely as persons from whom the Lords could claim instruction and advice; and their deliberate opinion was contemptuously set at nought.

The rights of the Lords, as 'Lords of Parliament,' not as ancient as they supposed.

The Lords insisted again and again upon their privileges as Lords of Parliament 'of ancient time accustomed.' They did not perceive, but possibly the lawyers did, that the Parliament of the reign of Richard II differed materially from any assembly known in the reign of John. Though it might be true that one of the Peers of the King's Court could claim judgement by Peers of the same Court, and though the word Parliament, when it came into fashion, might have been loosely used to express a meeting of the King's Court in earlier times, yet there is nothing to show that immediately after the Conquest, or even in the reign of Edward I, every man who owed suit to the Court could claim to be present when another man also owing suit to the Court was to be judged. According to Magna Charta he was to be judged by his peers, but it is nowhere said that the whole of his peers were to be in attendance. When Edward I summoned in one year some of his Barons, and in other years others, to consider grave matters of State, it could never have been in contemplation that all those who had ever been summoned, or their representatives, had gained a right to be present when a Peer was to be judged. The claim could have been advanced only at a time when certain persons appeared to have acquired or to be acquiring a prescriptive right to be called to Parliament. The prescription, if it existed, was not of very ancient date. It seems, however, to have been the only warrant for the doctrine that all the Lords had the right to hear, 'in full Parliament,' every serious charge which might be made against a Peer.

No superior tribunal to call in question the principles

There is, indeed, nothing to show that the lawyers of the period laid any stress on this particular point, and their objections may have had relation only to the form in which the appeal was drawn, or absolutely to the proceeding by appeal in itself. The mode of accusation had

certainly been recognized in the time of Bracton. They may, however, have taken the view (as the famous Littleton did in a subsequent reign) that an 'Appeal' not being at the suit of the King, but at the suit of subjects, did not fall within the words of Magna Charta, which refer only to proceedings taken by or on behalf of the King himself. They may also have considered that the articles of accusation were not in accordance with the Statute of Treasons passed in the previous reign. These were points on which they were more competent to give an opinion than any other persons in the kingdom. The Lords, however, though they may have placed themselves in a false position by asking the advice of the Judges and then rejecting it, and though they may have misconceived their true position in Parliament, were yet, perhaps, from one point of view, technically in the right. It was true, as they said, that other Courts were inferior. It was true that the other Courts owed their origin to the *Curia Regis* which the Lords represented in one of its aspects. If they chose to lay down certain principles with regard to the trial of certain offences, and had the assent of the King, there was no tribunal which had authority to contradict them.

CHAP. X.
which they
laid down.

It may here be worthy of remark that although the Archbishop of York was judged by the Peers, he was not in that respect placed on a higher level than Tresilian the Lord Chief Justice, or even than Brembre and others who were simple knights. Knights were appealed before the Lords together with Peers; a Bishop was impeached before them together with knights. A later doctrine that a commoner could be impeached before the Lords for high misdemeanours only, and not for treason or felony¹, had not as yet come into being, and was not finally held to be law. Impeachment itself was of quite recent growth (the earliest case having been in 1376)², and had as yet, perhaps, hardly attained the technical signification which it acquired in

'Impeachment' of recent growth, and not yet defined as in after-times.

¹ 4 Bl. Com., 256-257.

² In that year Richard Lyons, a merchant, of London, and a farmer of subsidies, was 'empeschez et accusez,' by the Commons,

CHAP. X. after-times. The word had long been in use to signify any kind of accusation in any Court, and had originally no special reference to an accusation brought by the Commons before the Lords.

The Commons have their right to impeach recorded on the Roll of Parliament in 1397.

Towards the end of the reign of Richard II, however, impeachment by the Commons becomes a more important factor in the history of the constitution. In the year 1397 the Commons made protestation before the King, in full Parliament, that they intended, by his leave, to accuse and impeach any person or persons, as often as seemed to them good, in the Parliament then sitting. They prayed the King to be pleased to accept their protestation, and they prayed that it might be entered of record on the Roll of Parliament.

They impeach the Archbishop of Canterbury of High Treason.

Richard gave his consent, and on the same day the Commons impeached Thomas de Arundel, Archbishop of Canterbury, of High Treason, before the King, in full Parliament. The King took time to consider, as the Archbishop was in so exalted a position and a Peer of the Realm. The Commons again prayed that there might be such judgement against the Archbishop as the case demanded. Then the King 'recorded in Parliament' that the Archbishop had appeared before him in the presence of certain Lords, and confessed, and put himself upon the King's grace. The King, and all the Temporal Lords and Thomas de Percy (who had 'sufficient power from the Prelates and Clergy of the kingdom of England' as appeared of record in Parliament), adjudged the matters admitted by the Archbishop to be Treason and the Archbishop to be a traitor. Sentence was then delivered in Parliament that the Archbishop should be banished from the realm of England¹.

We here find in a very short space three very remarkable statements:—that the Archbishop of Canterbury was a Peer of the Realm, that the Commons were allowed to impeach

of several deceits, extortions, and other ill deeds done by him to the King and people. *Rot. Parl.*, 50 Ed. III, no. 17 (printed, vol. ii. p. 323).

¹ *Ib.*, 21 Ric. II, nos. 14-16 (printed, vol. iii. p. 351).

a Peer, and that in trials in which loss of life or member was concerned the Prelates and Clergy, though not present in their own persons, were represented collectively by one Procurator. CHAP. X.

The attendance of this Procurator or proxy was altogether an innovation. It came about through a petition of the Commons, who complained that many judgements and ordinances previously made had been annulled because the estate of the Clergy was not present at the time of the making. Their prayer consequently was that the Prelates and Clergy should appoint a Procurator with sufficient power to consent in their name to all matters and ordinances in Parliament. The Spiritual Lords agreed to give their full power to a layman¹, and thus we find 'Monsieur Thomas de Percy' voting on their behalf at the trial of an Archbishop for High Treason. The fact that the proxy of the Prelates sat and voted on a trial for treason would go far to show that the right to sit and vote was now considered to be inherent in them if they chose to exercise it. It might then very fairly be argued that if they had the right to try other Peers they had also themselves the right to be tried by Peers if only they were willing to exercise it.

The Procurator of the Clergy represents the Spiritual Lords at the trial.

At the end as in the earlier part of this turbulent reign, however, it is manifest that the mode of dealing with charges of treason against Peers and others had not been reduced to any satisfactory system. At the very time at which an 'impeachment' was brought by the Commons against the Archbishop of Canterbury, an 'appeal of Treason in Parliament' was again brought by some of the Peers against their enemies. The position of the rival factions in 1397 was the reverse of that which it had been in 1387; and the Duke of Gloucester, the Earl of Arundel, and the Earl of Warwick, who had previously been the appellors, became, in their turn, the appealed².

Another Appeal of Treason in Parliament: a better system needed.

¹ *Rot. Parl.*, 21 Ric. II, nos. 9-16 (printed, vol. iii. pp. 348-351).

² *Ib.*, 21 Ric. II, no. 1 (printed, vol. iii. p. 374), and *Ib.*, 1 Hen. IV, nos. 1-10 (printed, vol. iii. pp. 449-452).

CHAP. X. It seems, nevertheless, to have been generally felt, even in these troubled times, that some measures should be taken to set the law on a more secure foundation. Very important changes were consequently effected in the reign of Henry IV, as will be shown in the next chapter.

CHAPTER XI.

TRIAL BY PEERS FROM THE REIGN OF HENRY IV: COURT OF
THE LORD HIGH STEWARD: TRIAL OF SPIRITUAL LORDS:
TRIAL OF PEERESSES: IMPEACHMENTS.

IN the first year of the reign of Henry IV, it was enacted that no Appeal should be pursued in Parliament¹. The reason was, in all probability, the abuse of the engine of Appeal in the previous reign. This Statute effected a complete change of the law with regard to trial by Peers. The Appeal was the earliest form of accusation in cases of treason, and, when it was brought against a Peer, it was carried to a decision before the Peers of the Realm. After this Act, however, a Peer could be judged by the Peers in Parliament only when the proceeding was by indictment or impeachment. At the same time a great innovation was made by the institution of the Court of the Lord High Steward as a Court for the trial of Peers by Peers.

CHAP. XI.
Abolition
of accusa-
tion by
'Appeal'
in Parlia-
ment.

The first known instance of trial in the Court of the Lord High Steward occurred early in the year 1400 (the year in which the Act relating to Appeals was passed). An Earl, described in the report of the proceedings as Earl of H., was then indicted of High Treason, in London, by virtue of a Commission, before the Mayor and Justices. The accusation was that he and others had agreed to make a 'mumming' on the night of the Epiphany, during which

The first
reported
trial in the
Court of
the Lord
High
Steward.

¹ Stat. 1 Hen. IV, cap. 14.

CHAP. XI. they intended to kill the King, who was then at Windsor. Afterwards the King directed a Commission to another Earl described as the Earl of D., in which the charge was recited. The office of Steward of England, being then vacant, was granted to the Earl of D., in order that he might sit in judgement on the Earl of H. All the Lords were commanded to be attendant upon him, as well as the Constable of the Tower, who was to bring the prisoner before him on the day which he might appoint. On that day the Lord High Steward sat apart in Westminster Hall, under a cloth of State; and the Earl of Westmoreland (who appears to have been at this time Constable of the Tower) and all the other Earls and Lords sat at a great space from him, and not on the same bench, 'but on other forms downward in the said Hall.' And all the Justices and the Barons of the Exchequer sat in the midst, around a table between the Lords. Three '*oyes*' were solemnly made by the Crier, and the Commission was read. Then the Justices delivered the indictment to the Steward. He handed it to the Clerk of the Crown, who read it to the Earl of H. The Earl confessed, and thereupon Hill, one of the King's Sergeants, prayed that the Lord Steward would give judgement. The Lord High Steward recounted the whole matter, and then gave judgement that the Earl should go back to the Tower of London, and be thence drawn to the gallows and there hanged, and 'let down' again while still living, and that his entrails should then be drawn out of his body and burned, and that he should be beheaded and quartered, 'and so may God be propitious to his soul.' The Justices said that, had the Earl chosen to deny the treason, it would have been the Steward's duty, as soon as the verdict had to be given, to ask of each Lord separately and openly what each thought in his conscience, beginning with the junior. Had the greater number said Guilty, judgement should have been given as above. 'And no Lord shall be put upon his oath in this matter¹.'

¹ *Year Book*, Mich., 1 Hen. IV, no. 1. fo. 1.

No less than four editions of the Year Books, all obviously printed, either directly or indirectly, from the same manuscript, agree in the form of the report, giving only initials instead of the names of the Earl who was indicted and of the Earl who was Lord High Steward. Sir Edward Coke appears to have been acquainted with the report in another form, and tells us, with a reference to the Year Book, that 'upon the arraignment of John Holland, Earl of Huntingdon, the first that was created Steward of England, *hac vice*. was Edward Earl of Devon¹. He also adds some details which are not given in the printed books².

CHAP. XI.

The accused identified as John Holland, Earl of Huntingdon.

The precise date of the trial is not stated in the report, but it must have been shortly after the commission of the alleged offence on the sixth of January, 1399-1400. There was then no Parliament in existence. The Parliament of the first year of the reign of Henry IV began on St. Faith's Day (the 6th of October), 1399³, and ended on Wednesday, the 19th of November, in the same year⁴. It is therefore perfectly clear that the Earl of Huntingdon was not tried in the House of Lords during a session of Parliament, with the Lord High Steward presiding, but in the Court of the Lord High Steward when Parliament was not sitting. It cannot, however, be denied that many difficulties present themselves with regard to the proceedings. It is asserted by some of the Chroniclers⁵, and, perhaps, implied by others that the Earl was put to death at Pleshey in Essex without any trial at all. A contemporary says that the Earl remained in London until the event of the conspiracy was known, then made several attempts to escape by sea, and was afterwards captured in Essex, and taken to the castle of Pleshey to be held in safe custody. According to this account he was beheaded there on the 15th of January, in the presence of a great

Difficulties and contradictions with regard to the case.

¹ 4 Inst. 59.

² 3 Inst. 28-29.

³ *Rot. Parl.*, 1 Hen. IV, Heading (vol. iii. p. 415).

⁴ *Ib.*, 1 Hen. IV, no. 93 (vol. iii. p. 432).

⁵ The very circumstantial details in *Waurin* do not bear upon them the impress of truth.

CHAP. XI. number of persons of the district¹. This is not absolutely inconsistent with the law report, because the Earl may (though it is hardly probable) have been brought to London for the trial, may have been sent back to Pleshey, from the Tower, and may have been there put to death in due course of execution, or by a mob which overpowered the King's officers, and took the law into its own hands. The report is to some extent confirmed by independent testimony. On the 10th of January Thomas de Arundel, Archbishop of Canterbury, wrote a letter in which he described the Earl as being held captive by the King's power². The date is five days earlier than the alleged beheading at Pleshey, and the interval afforded sufficient time to bring the Earl to the Tower, to try him, and even to send him back to Pleshey. Moreover, on the very same 10th of January, the King, with the advice of the Council, sent a precept to the Constable of the Tower to receive the Earl of Huntingdon from the person who would deliver the prisoner into his custody, on the King's behalf³.

Subsequent
judgement
by the
Lords
Temporal
with the
assent of
the King.

These contemporary documents of undoubted authority would suffice to outweigh any statements of Chroniclers to the effect that the Earl was put to death without trial, were there not a document also of the highest authority which is apparently on the other side. In the following year (1401) all the Lords Temporal present in Parliament, with the assent of the King, declared and adjudged that Thomas Holland late Earl of Kent, John Holland late Earl of Huntingdon and others were traitors, as having levied war against the King, and that they should forfeit all the lands and tenements which they had in fee simple, notwithstanding the fact that while levying war they had been beheaded by the King's lieges without due process of law⁴. It is quite clear, from this passage, either that the Earl of Huntingdon

¹ Walsingham, *Ypodeigma Neustriæ* (Rolls Series), p. 390; *Historia Anglicana* (Rolls Series), vol. ii. p. 245.

² *Litteræ Cantuarienses* (Rolls Series), vol. iii. p. 74.

³ *Rot. Lit. Claus.*, 1 Hen. IV, m. 22 (printed in Rymer's *Fœdera*).

⁴ *Rot. Parl.*, 2 Hen. IV, no. 30 (printed, vol. iii. p. 459).

was never tried in the Court of the Lord High Steward, or that, if he was, the trial was not recognized by the Temporal Lords as being in due legal form. CHAP. XI.

This declaration of the Lords Temporal was in the form of an Act of Attainder, but without the assent either of the Lords Spiritual or of the Commons. It may, however, have been merely a measure of precaution, so far as the Earl of Huntingdon was concerned. As there was no precedent for the trial of a Peer when Parliament was not sitting, it may well have been thought that the effect of the judgement in the Court of the Lord High Steward was doubtful with regard to the forfeiture of lands, and that a deliberate statement in Parliament by the Temporal Lords, who would in fact have given judgement in Parliament in earlier times, would serve to prevent any subsequent dispute. It is impossible to believe that the report in the Year Book, confirmed as it is by contemporary evidence, was a pure invention.

We learn from this case that an indictment for High Treason against a Temporal Lord was now removed from the inferior Court in which it had been found, and brought before Peers of the Realm for trial. When a Spiritual Lord was indicted there was no such removal, the reason being, to all appearance, that the Spiritual Lords would not recognize any lay jurisdiction, and consequently could not claim the privilege of peerage. The Spiritual Lords were not tried by Peers of the Realm,

Thomas Merkes, Bishop of Carlisle, had been suspected of complicity in the conspiracy of the Earl of Kent and the Earl of Huntingdon, but he was not treated as a Peer of the Realm, and does not seem to have made any claim to be tried by the Peers. A commission of Oyer and Terminer issued, before which the Bishop was indicted of High Treason. The Justices of Oyer and Terminer sent their precept to the Sheriffs of London to summon a jury of Aldermen and Citizens. The Bishop was brought up by the Constable of the Tower. Thomas Merkes, Bishop of Carlisle, indicted of High Treason.

The King directed his 'writ close' to the Justices with reference to a Statute of the reign of Edward III, in which

CHAP. XI. it had been provided that no Archbishop or Bishop should be accused before Justices of any crime without the King's express command¹. By the advice of his Council he now directed that if any Archbishops or Bishops were accused or indicted before them they were to proceed as they should see fit, in accordance with right, and the law and custom of the realm. The Bishop was arraigned and asked how he would acquit himself. He said that he was a Bishop anointed, that under the name of Bishop he was indicted, and that he did not think he ought to be arraigned in respect of the crime before the Justices, or that he ought to make any answer. If, however, it should appear to the Justices that by the law of the land he was bound to answer, he was prepared with the answer which he should give. The Justices told him that the charges contained in the indictment extended to the death of the King, and the destruction of the whole realm of England, and consequently the manifest subversion of that Anglican Church in virtue of which he claimed to be privileged. Each and all of these matters, they said, were High Treason in the extreme degree, and the Bishop must answer at his peril or else be straightway held convicted.

Pleads,
with a
saving
only for
his eccle-
siastical
liberty,
and is
convicted
by a jury.

The Bishop said that, saving his ecclesiastical liberty, inasmuch as he was a Bishop anointed, and under protest that his answer must not derogate from the episcopal privilege or dignity, nor be drawn into a precedent with regard to the dignity of others, he pleaded Not Guilty of the treasons and felonies alleged, and thereof for good and evil he put himself upon the jury. The jury found him Guilty. The Justices, not being sufficiently advised with regard to the judgement which should be pronounced, remanded him to the Tower for safe keeping.

Is par-
doned by
the King.

The indictment and subsequent proceedings were afterwards removed into the King's Bench. In the meantime Merkes ceased to be Bishop of Carlisle, having been translated by the Pope to the Bishopric of Cephalonia. When

¹ Stat. 18 Ed. III, cap. 1.

he was brought into the King's Bench, it was as 'Thomas Merkes late Bishop of Carlisle,' and no longer as an English Bishop. He was then asked whether he had anything to say wherefore the Court should not proceed to judgement against him on the conviction. For reply he only produced the King's charter of pardon¹. CHAP. XI.

It will be observed that, from first to last, the Bishop never claimed privilege of peerage. As Becket and Stratford had done before him, he denied that he was amenable to the secular jurisdiction. He would have exemption or nothing. To him all lay Courts were alike. Had he asked for trial by the Peers he would at once have abandoned the point for which he and his order were contending. If compelled to plead he would plead, and if he must accept a verdict he would accept it; but it was a matter of absolute indifference to him whether the verdict was given by Aldermen and Citizens or by Barons and Earls. Never claimed privilege of peerage.

The mode of trial by Peers seems to have remained in want of clear definition during some subsequent reigns. Charges of heresy and sorcery became confused with charges of High Treason. If any one compassed the death of the sovereign by making a waxen image of him and slowly melting it before a fire, the acts were, from one point of view, sorcery, from another point of view High Treason. In the nineteenth year of the reign of Henry VI the Duchess of Gloucester was brought before a tribunal consisting of the King, Cardinal Beaufort, Cardinal Kempe, five Bishops, and some other ecclesiastics, and sitting in St. Stephen's Chapel, at Westminster. She was accused of having, with the aid of a woman known as the witch of Eye, had a waxen image of the King made and set before a fire, with the design that, as it slowly lost its form, the King might, through her incantations, slowly sink into the grave. The offence actually charged against her was witchcraft, of which she was pronounced guilty, and Absence of settled rules for trial by Peers.

¹ The whole of these proceedings appear in the *Placita coram Rege, Rex* (i.e. the Crown Roll of the King's Bench), Hilary, 2 Hen. IV, R^o. 4.

CHAP. XI. for which she was sentenced to a very humiliating penance, and sent off to die a prisoner in the Isle of Man¹.

Act of
Henry VI
for the
trial of
Duchesses,
Countesses,
and
Baronesses,
by Peers.

Before this time there had been no settled rule with regard to the trial of Peeresses for high treason, or felony, or misprision of either. Duchesses, Marchionesses, and Viscountesses were of comparatively recent origin, as were the titles of Duke, Marquis, and Viscount. There had now and again been a Countess in her own right, and there had been Countesses who were the wives of Earls. The great majority of the baronage, however, consisted of persons who were only Barons; but 'Baron,' as has been shown elsewhere, was not a term of dignity in the same sense as Earl. Except in the sense of a woman holding by barony, the term Baroness hardly appears to have been known before the fifteenth century. The wife of a Baron had no legal name except that of wife of her husband², and before the case of the Duchess of Gloucester there had been no special reason for considering how Peeresses ought to be tried.

As a seat in the House of Lords was now regarded as an honour rather than a burden, and as the idea of strict hereditary right was established, it was natural that the position of women who were either themselves of noble

¹ *Rot. Lit. Pat.*, 19 Hen. VI, part ii. m. 16 (printed in Rymer's *Foedera*, x. 851); Fabyan, 19 Hen. VI; *Political Poems and Songs*, Ed. Wright, vol. ii. pp. 205-208.

² So, in the reign of Edward VI, it was held that, when the widow of a Baron married an Esquire, she could not be correctly described in a writ as 'Lady,' bearing her former husband's title. A writ of partition was brought against the Duke of Suffolk, and others, by 'Ranulph Haward Esquire, and the Lady Anna Powes, his wife.' Exception was taken to this description as being a misnomer, 'because she ought to have been named by the name of her husband and not otherwise.' Chief Justice Montague and Justice Hales were of opinion that the exception was good, 'because by the law of God the woman was under the power of her husband (*sub potestate viri*), and so her name of dignity should be changed in accordance with his degree, notwithstanding the courtesy shown to ladies of rank and of the Court.' The plaintiffs accordingly brought another writ in which they were described as Ranulph Haward and 'Anna his wife, late wife of Lord Powes, deceased.' Dyer's Reports, M. 6 & 7 Ed. VI, no. 51. fo. 79 b.

blood or were the wives of Peers should be considered. CHAP. XI.
 The trial of the Duchess of Gloucester for sorcery was a blow struck through her at the Duke of Gloucester by his enemy Cardinal Beaufort. In spite of faction, it was the interest of all the Temporal Lords that they should not have their dignity indirectly assailed in the persons of their wives. For this reason probably an Act was passed in the following year touching the mode of trial of 'ladies of high estate, Duchesses, Countesses, or Baronesses.' They, whether married or sole, were, when indicted of high treason or felony, to be brought to answer and judged before Judges and Peers of the Realm in the same manner as Peers would be judged if indicted or impeached of the same offences¹. The legislators of the day, however, abstained from defining in precise terms what that mode of trial was.

Though accusation by appeal in Parliament was abolished, the accusation by appeal elsewhere was still a recognized mode of procedure. If a Peer, or a Lady of the rank mentioned in the Act of Henry VI, committed a murder, or other felony, there was nothing to prevent recourse to an appeal against him, or her. The widow, for instance, of a peasant might 'appeal' a Duke for the murder of her husband. In the reign of Edward IV the famous Judge Littleton, author of the well-known work on tenures, enunciated the doctrine that, when an 'appeal' was brought against a 'Lord of the Realm,' he not only should not be tried by the Peers in Parliament, but should not be tried by Peers at all. He should be tried just as any common person². A precedent, too, was cited in the case of Lord Gray of Codnor. This continued to be the law until the year 1819, when all proceedings by appeal, together with trial by battle, were abolished³.

No trial by Peers in procedure by 'Appeal' of murder, &c.

When, on the other hand, said Littleton, there is an indictment of felony or treason, which is at the King's

Court of the High Steward,

¹ Stat. 20 Hen. VI, cap. 9.

² *Year Book*, Easter, 10 Ed. IV, no. 17. fo. 6.

³ Stat. 59 Geo. III, cap. 46.

CHAP. XI. suit, as distinguished from that of a subject, a Peer of the Realm is to be tried by the Peers. Upon the indictment of a Lord, he added, the matter is to be sent into Parliament, and there the Steward of England is to put him to answer. It appears from this that the Court of the Lord High Steward, sitting independently of Parliament, was hardly yet recognized as a proper tribunal for the trial of Peers, though the Lord High Steward might preside at the trial in the House of Lords.

Right of Spiritual Lords to be present by one Procurator, throughout the trial of a Peer, still recognized.

Littleton also made another remarkable statement—that when a Peer is put to answer in Parliament, the Spiritual Lords, who cannot consent to the death of a man, are to make a Procurator to represent them. It thus appears that a lawyer of no less eminence than Littleton still recognized the right of the Spiritual Lords to be present, by a collective proxy, at the trial of a Peer, and so practically attributed to them all the privileges of peerage.

The Court of the Lord High Steward fully recognized in the reign of Henry VII: how constituted.

Not very long after this time, however, the Court of the Lord High Steward, sitting when there was no Parliament, became an accepted institution. When the jurisdiction of the Lords had been delegated to this Court, it soon became customary for the Steward to summon, not the whole, but only a small number of the Peers. For the trial of the Earl of Warwick in the reign of Henry VII, he was commanded to summon such and so many Lords, peers of the Earl, as might make the truth the better be known. Twenty-two only in addition to the Lord High Steward, constituted the Court. One was a Duke, four were Earls, and the rest (including John Kendall, the Prior of the military order of St. John of Jerusalem in England) were Barons¹. At the trial of the Duke of Buckingham, in the thirteenth year of the reign of Henry VIII, there were nineteen Peers present, of whom one was Thomas Docwra, Prior of St. John of Jerusalem in England; and

¹ *Baga de Secretis*, Pouch II, mm. 1, 2, 3 (Calendared by Sir F. Palgrave in the Third Report of the Deputy Keeper of the Records, App. 2. p. 218).

the Prior gave his vote declaring the Duke guilty¹. This, however, was the last time that a Prior of St. John of Jerusalem sat in the Court of the Lord High Steward; and the corporation of the Knights of St. John was dissolved in the thirty-second year of the same reign². Those who afterwards sat in the Court of the Lord High Steward, were exclusively Peers possessing some heritable dignity, which no Prior, as Head of the Hospital of St. John in England, had ever enjoyed. CHAP. XI.

The practice of summoning only a small number of Peers to the Court of the Lord High Steward, which continued for many generations, naturally gave almost unlimited power to the Crown of securing a conviction. It also had an important effect in finally extinguishing the claims of the Spiritual Lords to the rank of Peer of the Realm. As they could not pass sentence it was idle to summon any of them to attend. As the members of the Court were limited in number there was not the slightest necessity to summon the Procurator of the Spiritual Lords as a body, even had he had power to act; and as he was only their Procurator in Parliament, it seems doubtful whether he could have sat in the Court of the Lord High Steward.

As has been shown, in another chapter, the Spiritual Lords began to be called 'Lords of Parliament' and not Peers of the Realm in the reign of Henry VII. They had for centuries struggled to be free from all lay jurisdiction, and now the Nemesis had come. The Court of the Lord High Steward was one of the engines for their degradation. It was a Court in which they could not sit, but one in which a true Peer of the Realm could give verdict and judgement. They were thus marked off from the peerage by a disqualification of no small importance. According to their own showing, or that of their predecessors, they were not to be tried by the Peers when accused

The
Spiritual
Lords not
represented
in it: their
fall from
the status
of peerage.

¹ *Baga de Secretis*, Pouch IV, Bundle 5. m. 30 (Calendared, p. 233).

² Stat. 32 Hen. VIII, cap. 24.

CHAP. XI. of treason or felony; by the march of events they were now precluded even from being present at the arraignment of a Peer according to the most ordinary form of proceeding. It is obvious that only a little was needed to deprive them of the right to be called Peers at all. The reign of Henry VIII was most disastrous to their order, and when the monasteries were dissolved and the Abbots ceased to sit in the House of Lords, the Bishops had no power to enforce a right which the injudicious action of their predecessors had forfeited.

Case of
Fisher in
the reign
of Henry
VIII.

One of the most remarkable facts in relation to the history of Trial by Peers is that the advocates of the rights of the Spiritual Lords, and the advocates of the opposite doctrine, have alike cited the case of John Fisher, sometime Bishop of Rochester, as an instance in which a Bishop was tried otherwise than by the Peers of the Realm. The one party would have done well to place no reliance on the precedent, the other might have spared itself some unnecessary lamentations.

He was not
a Bishop
when tried
for High
Treason.

The Bishop of Rochester was never tried at all. John Fisher was attainted for misprision of Treason by Act of Attainder in the year 1534¹, deprived of his bishopric, and kept a prisoner in the Tower. He was afterwards indicted before a special commission of Oyer and Terminer for High Treason in having denied the King's supremacy. There were two distinct indictments. In one of them he was described as John Fisher, late Bishop of Rochester. In the other he was described as 'John Fisher, late of the City of Rochester, in the County of Kent, Clerk, otherwise called John Fisher, Bishop of Rochester,' and, in another place, as in the first indictment, as 'late Bishop of Rochester.' Upon the administration of interrogatories to witnesses in the Tower of London on the 7th of June, 1535, he was described as 'late Bishop of Rochester.' Upon the administration of interrogatories to himself on the following 12th of June, he was described as 'Mr. John

¹ Act of 26 Hen. VIII, cap. 3.

Fisher, D.D.' He laid no claim to any kind of privilege, either as a Peer or as a Bishop, because, as he was no longer a Bishop, he certainly had no other title to be considered a Peer. A jury was empanelled from the neighbourhood of the Tower of London. Of the twelve who were sworn two were Knights and the rest Esquires, and they found him guilty¹. The legality of the form of proceeding was never questioned.

Though, however, Fisher was neither indicted nor tried while an English Bishop, there is no reason to suppose that had he still been an English Bishop his trial would have been different. In the first year of the reign of Queen Mary, Thomas Cranmer, Archbishop of Canterbury, was brought to trial before a Special Commission of Oyer and Terminer on an indictment found in the King's Bench. When arraigned he pleaded not guilty, and put himself 'upon the country,' which was a jury from the county of Middlesex. Before they retired to consider their verdict, but after sufficient and probable evidence had been given on the part of the Queen, as is stated in the record, the Archbishop withdrew his plea, and pleaded guilty. Judgement passed in the usual form².

The Archbishop thus clearly admitted the jurisdiction of the Court, and the power of a jury to pronounce whether he was guilty or not guilty. He could not, from his antecedents, deny, as Orleton and Stratford had denied, the jurisdiction of any secular Court. He made no claim to be tried by the Peers, and no exception was ever taken to the validity of the proceedings. From this time onwards, notwithstanding some protests on the part of ecclesiastical historians, it seems to have been settled law that Bishops do not enjoy the right of being tried by Peers of the Realm, either in Parliament, or in the Court of the Lord High Steward³.

CHAP. XI.

Cranmer, in the reign of Mary, was tried, while Archbishop of Canterbury, and sentenced, for High Treason, in a Court of Oyer and Terminer.

It has since been settled law that Bishops have no right to be tried by Peers of the Realm.

¹ *Baga de Secretis*, Pouch VII, Bundle 2.

² *Ib.*, Pouch XXIII.

³ Staunford, *Les Plees del Coron*, p. 153; 3 Inst. 30; and many subsequent authorities.

CHAP. XI.

No instance
in which a
Spiritual
Lord, in-
dicted of
Treason or
Felony,
has been
tried by
Peers of
the Realm.

Spiritual Lords have been, with commoners, 'appealed' of Treason, and judged by Peers. They have been tried by the Lords when impeached, as commoners have also. They have, however, never successfully asserted the exclusive privilege of being tried, as only Peers are tried, by Peers alone, upon an indictment of treason or felony, or misprision of either, found in a Court below, and removed into the House of Lords, or into the Court of the Lord High Steward. It may be that the right was, in early times, inherent in them, as Peers of the King's Court holding in barony. If so, it was a right which they did not choose to enforce, and which even they rejected with contumely. They again and again expressed their determination to be free not from the jurisdiction of those among the King's Courts which were inferior to the House of Lords, but from all secular jurisdiction whatever.

Effect of
the aboli-
tion of
feudal
tenures
on the
Bishops
after the
Restora-
tion.

The Bishops were never in a position to recover, after the complete abolition of the feudal tenures at the time of the Restoration, the privilege which they had in earlier times rejected. As it was in origin one belonging to the feudal *Pares Curtis* or *Curiae*, there was no title on which they could rest their claim to it when the King's feudal Court had come to an end. The privileges of the Temporal Lords were continued by the Act which ended tenure by military service, but no privileges could be continued which were not recognized as being in existence.

The
privileges
of peerage
afterwards
held to
depend on
blood.

When, however, the feudal system was formally abolished in England, the doctrines relating to blood which had grown up with it continued to maintain their ground. The descent of lands, and the descent of dignities remained precisely as they were before. The result was that nobility of blood became of even greater importance than ever. It was from nobility of blood alone that the only persons now recognized as Peers derived their claims and their privileges. Their ancestors had owed and rendered services to the State, which they were no longer under any obligation to yield. Their blood was the source of their

dignity, and they regarded the admission of a new man to their order as a very high honour, especially as the blood of the new-comer became ennobled like their own. CHAP. XI.

It was from this point of view that the right of trial by Peers was now regarded. The Bishops, it was said, by the clearest and most popular exponent of English Law in the eighteenth century, 'have no right to be tried in the Court of the Lord High Steward, and therefore surely ought not to be Judges there. For the privilege of being thus tried depends upon nobility of blood rather than a seat in the House, as appears from the trial of Popish Lords [while incapable of a seat there], of Lords under age, and since the Union [with Scotland] of the Scots nobility, though not in the number of sixteen [representative Peers], and from the trials of females, such as the Queen Consort or Dowager, and of all Peeresses by birth, and Peeresses by marriage also, unless they have, when Dowagers, disparaged themselves by taking a commoner to their second husband¹.' And among them the privilege of trial by Peers of the Realm.

A Peeress by marriage, it will be observed, is not necessarily herself of noble blood, and may enjoy her privilege in virtue of the blood of her husband. This, however, is quite in accordance with the old common law of England, according to which a married woman has no name and no condition except that of wife of her husband. The doctrine of blood is thus made quite consistent with itself, as the foundation of all the privileges of Peerage. It will nevertheless be apparent to every one who has read these pages that although there was continuity of descent, the Peerage after the Restoration, and its privilege of trial by Peers, rested on a different foundation from that of the Peerage existing before the Great Rebellion.

The old forms, however, survived, and the Court of the Lord High Steward, and the general principles relating to the trial of Peers remained as they had been in the days of Henry VIII. The privilege in relation to trial Survival of the Court of the Lord High Steward, as it had

¹ 4 Bl. Com. 262.

CHAP. XI. by Peers had been carefully guarded on the passing of every new Act relating to treason or felony.

been in the
reign of
Henry
VIII.

Privilege
of trial
by Peers
guarded in
successive
Acts.

Thus when, in the reign of Henry VIII, an Act was passed concerning the trial and punishment of murder and bloodshed within the limits of the King's palace or house, it was expressly provided that the trial of Peers for any of the offences mentioned should remain as before¹. So also when certain treasons and misprisions of treason committed out of the realm were made triable in England, the privilege of Peers to have trial by their peers, after indictment, was expressly saved to them². Again, when on the accession of Elizabeth an Act was passed in relation to ecclesiastical jurisdiction, by which certain penalties were provided for certain offences against the Act, and certain offences were made treason, a Peer indicted of treason was to have trial by his peers 'in such manner and form as in other cases of treason hath been used'³. On the restoration of Charles II an Act was passed for his protection, to remain in force only during his life, and once more it was provided that no Peer should be tried for any offence under the Act, except by his peers, though, upon conviction, he was to be disabled for life for sitting in Parliament unless he received the King's pardon⁴.

Act of
William
III: all
the Peers
to be
summoned
on trial of
a Peer
for certain
Treasons
only.

During all this time a Peer could, upon indictment of high treason or felony, claim to be tried by Peers of the Realm, but not necessarily by the whole of the Peers. In the reign of William III, however, an Act was passed which had the effect of placing the jurisdiction in trials for treason in the whole body of Peers whether Parliament was sitting or not⁵. After reciting that 'upon trials of Peers

¹ Stat. 33 Hen. VIII, cap. 12. sec. 20.

² Stat. 35 Hen. VIII, cap. 2. sec. 2.

³ Stat. 1 Eliz., cap. 1. sec. 34.

⁴ Stat. 13 Car. II, stat. 1. cap. 1. sec. 7.

⁵ Stat. 7 Will. III, cap. 3. sec. 11. It has sometimes been argued that the Lords Spiritual are included in the word 'peers' in this Act; but as they could not 'vote at the trial,' and have always withdrawn before judgement, it seems clear that they are excluded.

or Peeresses a major vote is sufficient either to acquit or to condemn,' the Statute provided that upon the trial of any Peer or Peeress either for treason or misprison of treason, all the Peers who have a right to sit and vote in Parliament shall be duly summoned, and that every Peer summoned and appearing shall vote at the trial. The Act did not extend to proceedings by impeachment, nor did it extend to indictments for counterfeiting the coin of the realm, the Great Seal, the Privy Seal, the Sign Manual, or the Privy Signet, and no mention was made in it of any kind of felony.

The benefit of this Act was extended to offences declared to be High Treason by another Act passed in the reign of Queen Anne¹. These had relation to the government of the Queen's land-forces when serving out of England or Ireland. They included correspondence or treating with the Queen's enemies, or rebels, without her licence, or that of the Commander-in-Chief². Other offences—those of raising sedition or mutiny in the army, refusing to obey, striking or resisting a superior officer—were made felonies³. Any Peer of the Realm who had, beyond sea, committed any treason or felony mentioned in the Act, and who had not already been tried by martial law, but had been indicted after his return, was to have his trial by Peers according to custom⁴.

In the reign of Queen Anne also provision was made for the indictment of Peers of Great Britain who had committed 'high treason, petit treason, misprison of treason, murder, or other felonies' in Scotland⁵. No provision, however, was made as to the mode of trial after indictment, except that the proceedings were to be 'in the same method' as those following any inquisition found before Justices of Oyer and Terminer in England. Some doubts subsequently arose with regard to the interpretation of the Act, and it was declared in the reign of George IV,

CHAP. XI.

Extended
under
Queen
Anne.The trial
of Peers
of Great
Britain
committing
Treason or
Felony in
Scotland:
Acts of
Queen
Anne and
George IV.

¹ Stat. 2 & 3 Anne, cap. 20. sec. 43.

² Sec. 34.

³ Sec. 35.

⁴ Sec. 42.

⁵ Stat. 6 Anne, cap. 23 (or 78). sec. 12.

CHAP. XI. that the crimes in respect of which the Commission in the nature of a Commission of Oyer and Terminer might enquire in Scotland were 'all treasons, misprisions of treason, murders, and other crimes which infer a capital punishment by the law of Scotland, and all felonies and other crimes for which, if committed in England, a Peer of the United Kingdom would be tried by his Peers,' but that it should 'not be lawful for the Court of Justiciary, or any other Court in Scotland, to take cognizance of any of the aforesaid crimes; but such Courts shall and may try all other crimes committed by Peers in Scotland, if otherwise competent to try such crimes by the law of Scotland¹.' It was at the same time declared that the provisions of the explaining Act should extend to all Peeresses in their own right, to all wives of Peers, and to all widows of Peers not married to commoners who should commit crimes in Scotland². It was further declared that the Act should not apply to any Peer of Ireland while a member of the House of Commons³, and finally that it should not alter or affect any law in force with regard to the trial of Peers for high treason or misprision of treason⁴.

Privilege confirmed in 1862 in relation to offences under the Mutiny Acts.

In the year 1862 an Act⁵ was passed for the more speedy trial of certain homicides committed by persons subject to the Mutiny Acts, and it was again expressly provided that no one claiming the privilege of peerage should be rendered triable under the provisions of the Act⁶.

Thus the privilege of trial by Peers has been the most jealously preserved of all the privileges of Peers, from the time of its establishment to the present. Under the Act of William III, indeed, it was strengthened in relation to charges of treason, or misprision of treason in general, though not in relation to some excepted forms of treason, or to felony or misprision of felony. With regard to the

¹ Stat. 6 Geo. IV, cap. 66. sec. 1.

³ Sec. 13.

⁵ Stat. 25 & 26 Vict., cap. 65.

² Sec. 12.

⁴ Sec. 14.

⁶ Sec. 19.

last the law remained, to all appearance, as it was before, and it would seem that, if Parliament were not sitting, a Peer could be tried in the Court of the Lord High Steward consisting of a limited number of Peers. CHAP. XI.

It is, perhaps, open to question whether a Peer could waive his privilege of being tried by Peers of the Realm. The Committee of twelve Lords reported in 1341 that any submission by a Peer to the jurisdiction of an inferior Court ought not to prejudice other Peers, or even himself, on any subsequent occasion¹. The possibility of a Peer waiving his privilege seems, therefore, to have been then assumed. Under the Act of 1862 it is only a person claiming privilege who is exempted from the jurisdiction thereby established; and the omission of the claim would appear to cause the loss of the privilege, so far as any offences under that particular Act are concerned. As a general principle, however, Sir Edward Coke² maintained that a Peer has no power of waiver. He founded his opinion on a decision to that effect in the case of Lord Dacre of the North in the reign of Henry VIII, and on the twenty-ninth chapter of Magna Charta.

Question whether the privilege of trial by Peers can be waived.

As between Sovereign and Peers, and as between Peers and Peers, however, there is no doubt that every Peer (including those of Scotland, and of Ireland) has a right, when indicted of High Treason, of Felony, or of misprision of either, to be tried by Peers. When Parliament is sitting he has a right to be tried in the House of Lords (technically known as the Court of our Lady the Queen in Parliament), and when Parliament is not sitting, in the Court of the Lord High Steward. In the former case the Spiritual Lords may be present, as they are required to be according to the Constitutions of Clarendon, up to the point at which judgement is to be given, when they have to withdraw, and have always withdrawn, in compliance with the canons of the Church. Though present in full Parliament, as Lords of Parliament, during the early stages of the trial of Peers,

In trials of Peers, on indictments of Treason or Felony, the judgement always that of the Temporal Lords alone.

¹ *Rot. Parl.*, 15 Ed. III, no. 7 (printed, vol. ii. p. 127).

² 3 Inst. 30.

CHAP. XI. they have never been summoned, as Peers, to the Court of the Lord High Steward, and the only judgement which can be pronounced upon any Temporal Lord, or upon any Peer who is not a Lord of Parliament, on indictments of Treason, Felony, or misprision of either, is that of the Lords Temporal.

Doctrines
as to im-
peachment
after the
reign of
Richard II.

The wavering attitude of the Lords in relation to accusations against commoners in the reigns of Edward III and Richard II, and the trials by them of commoners impeached of High Treason in the reign of Richard II, have already been mentioned. In subsequent reigns the trial, before the Lords, of impeachments formulated by the Commons appears to have been a fully recognized institution, though it is sometimes lost from view during considerable intervals of time, and though disputes arose with regard to the offences to which it was applicable.

Among the earliest instances of impeachment are accusations of High Treason brought against persons who were not Peers of the Realm; and it is strange that so eminent a lawyer as Blackstone should have committed himself to the statement that a commoner could be impeached only of high misdemeanours¹. As in other matters, the rare use of a particular mode of proceeding and the long intermissions of Parliaments tended, without doubt, to cause uncertainty on the subject of impeachment. The more recent cases were naturally those to which most attention was paid.

Bill of
Attainder
the more
common
mode of
proceed-
ing.

Although there were 'impeachments' in the reign of Henry IV, and even of Henry VI, there were none between the year 1449 (when the Duke of Suffolk was impeached) and the year 1621 (when accusations were made against Sir Giles Mompesson), unless the doubtful case of the Bishop of London in 1534 be regarded as one. There had always been some confusion between the judicial and legislative powers of the Lords, and thus the proceeding by Bill of Attainder appears, for a very long time, to have

¹ 4 Com. 256-257.

superseded the proceeding by impeachment when, at any rate, the offence alleged was High Treason. This may have tended to obscure the right of the Commons to impeach a commoner of treason, and the jurisdiction of the Lords to try him. The subject was still further complicated by the usual practice of introducing a Bill of Attainder first in the House of Lords.

CHAP. XI.

Even the impeachment of Mompesson by the House of Commons, in 1621, was effected in a manner which showed some hesitation as to the mode of taking action. He was accused, not of High Treason, but of high crimes and misdemeanours. The Commons had a search made for precedents, and came to the conclusion that there was no power in their own House to inflict any punishment for an offence of a general character, and not merely affecting the privileges of their House. They desired a conference with the House of Lords, and at the conference described in general terms the nature of the charge, but they did not draw up, in accordance with the later practice, specific articles of accusation. The Lords, having found Mompesson guilty, sent a message to the Commons to the effect that they were prepared to give judgement. The Speaker, attended by the Commons, then demanded judgement at the bar of the House of Lords, and it was given accordingly¹.

Hesitation as to the mode of conducting the impeachment of Mompesson in 1621.

Within a few days of the impeachment of Mompesson, the Commons proceeded, in a not very confident manner, to impeach one of the greatest, if not the best of men. A committee was appointed to enquire into abuses in the courts of justice. A series of reports was made. Twenty-eight specific charges of corruption were drawn up against Francis Bacon, Viscount St. Albans, Lord High Chancellor of England, and laid before the House of Lords in writing, but Sir Edward Coke was to move that this should not be drawn into a precedent. Being in ill health, the Chancellor

Proceedings on the impeachment of Francis Bacon, Viscount St. Albans.

¹ *Journals of the House of Commons*, Feb. 27, 28, and March 3, 1620-1621 (vol. i. pp. 530-532, 535-537), and *Journals of the House of Lords*, March 26, 1621 (vol. iii. p. 72).

CHAP. XI. sent to the Lords a written statement, in which he confessed his guilt in general terms, and prayed for mercy. With this the Lords were not satisfied, and required him to answer the articles of accusation, one by one. He then made a further 'humble confession and submission,' admitting that there was at least some foundation for each of the charges, and, with an appeal for mercy, concluded: 'I do plainly and ingenuously confess that I am guilty of corruption, and do renounce all defence¹.'

After steps had been taken to ascertain from the sick Chancellor that his confession was indeed his own, the Lord Treasurer and others went to his bedside, and received from his hands the Great Seal. On May 2, 1621, the Gentleman Usher and the Sergeant-at-Arms received instructions from the House of Lords to summon him to appear in person on the following morning, when judgement was to be delivered. He was unable to attend. The articles of impeachment and his confession were read in his absence, and, on the question being put, it was agreed that he was guilty. The Bishops were present, and there was no dissentient. A message was sent to the Commons that the Lords 'were ready to give judgement against Lord Viscount St. Albans, if the Commons should come to demand it.' The Speaker of the Commons then came to the Bar of the House of Lords and demanded judgement against the Lord Chancellor, as his offences required. The sentence was that he should pay a fine of £40,000, be imprisoned in the Tower of London during the King's pleasure, be for ever incapable of holding any public office, place, or employment, and never sit in Parliament or come within the verge of the Court².

Discretion
of the
Lords as to
punish-
ment.

This judgement illustrates the power or discretion of the House in relation to punishment, when capital offences are not in question. It was also exercised in the

¹ *Journals of the House of Commons*, beginning March 15, 1620-1621 (vol. i. p. 554), and *Journals of the House of Lords*, March 19, 20, 1620-1621, April 14, 30, 1621, and May 3, 1621 (vol. iii. pp. 51-52, 53-55, 84-86, 98-101, 105-106).

² *Journals of the House of Lords*, May 3, 1621 (vol. iii. pp. 105-106).

same year, in a fashion which to modern eyes seems cruel, when sentence was passed upon Floyd for having used disrespectful words in relation to the Elector Palatine and his wife. CHAP. XI.

There is nevertheless very remarkable evidence that the principles upon which punishment should be inflicted by the Lords for high crimes and misdemeanours, after conviction upon impeachment, were not by any means definitely settled. Three years after sentence had been pronounced on Bacon, Lionel Cranfield, Earl of Middlesex and Lord High Treasurer of England, was impeached for corruption and other misdemeanours, and in particular for having taken bribes from the farmers of customs¹. He denied the charges, but used an argument which indicated, in the clearest manner, the habits of the time. It was that he had 'been a judge these eight years, and no complaint brought against him for corruption or bribery, which he hoped would weigh much with their lordships.' He was, however, found guilty, and the judgement passed upon him was almost identical with that passed upon Bacon. Yet Edward Hyde, afterwards Earl of Clarendon and Lord Chancellor, deliberately stated in his *History of the Rebellion*, that when Middlesex was 'condemned in a great fine, to a long and strict imprisonment, and never to sit in Parliament during his life,' this latter clause was 'of such a nature as was never before found in any judgement of Parliament, and, in truth, not to be inflicted upon any Peer but by attainder².

This discretion questioned by Lord Clarendon in the case of the Earl of Middlesex.

It is difficult to arrive at any certainty on a question of constitutional law, when a Chancellor makes a statement directly at variance with an undeniable fact. It is, therefore, not wonderful that difficulties arose between the Lords and the Commons at a somewhat later period. It is inevitable that, when there are charges of high treason, political feeling should run high. Men use arguments and

Case of Fitz-Harris, a commoner, impeached of High Treason in 1681 but not tried by the Lords.

¹ *Journals of the House of Commons*, beginning April 5, 1624 (vol. i. p. 755), and *Journals of the House of Lords*, May 13, 1624 (vol. iii. pp. 382-383).

² *Hist. Rebellion*, i. 45.

CHAP. XI. arrive at decisions which in calmer moments they would reject. Thus, when plots and rumours of plots filled the air, in 1681, it happened, for political reasons with which this history has no concern, that one Fitz-Harris was impeached of High Treason. He was already in prison and about to be indicted, if not already indicted, according to the forms of the common law. The Lords refused to entertain the impeachment, and voted that the proceeding against Fitz-Harris should be at common law. Upon this the Commons resolved 'that it is the undoubted right of the Commons, in Parliament assembled, to impeach, before the Lords in Parliament, any peer or commoner for treason or any other crime or misdemeanour, and that the refusal of the Lords to proceed in Parliament upon such impeachment is a denial of justice and a violation of the constitution of Parliaments¹.' The Lords, nevertheless, did not try the case, and Parliament was almost immediately afterwards dissolved. Fitz-Harris was then tried and found guilty by a jury.

This case was, however, not by any means conclusive with regard to the right of the Commons to impeach a commoner for High Treason. It was complicated with an attempt to withdraw a case from the cognizance of the Courts of King's Bench or Oyer and Terminer, and therefore involved something more than a merely Parliamentary question.

Sir
A. Blair
and other
commoners
impeached
of High
Treason
and tried
by the
Lords in
1689.

An opportunity arose, in the year 1689, for a better and a calmer review of the position, without any similar complications. Sir Adam Blair and four other commoners were then impeached of High Treason. The Lords appointed a committee to search for precedents. Upon receiving the report, in which precedents were cited, and after rejecting a motion to take the opinion of the judges, they resolved that the impeachment should proceed². It was thus settled;

¹ *Journals of the House of Commons*, March 26, 1681 (vol. ix. p. 711).

² *Journals of the House of Lords*, June 26 and July 2, 1689 (vol. xiv. pp. 260, 362-364).

as indeed it could only be settled, if the Lords were to try CHAP. XI.
impeachments against commoners at all, that they could try impeachments of commoners for capital offences. They could of course try Peers, whether the accusation took the form of impeachment or of indictment.

One of the chief features of an impeachment, which, however, was not universally recognized at first, is that it cannot be defeated by the pardon of the sovereign. A great dispute arose in relation to this subject on the impeachment of the Earl of Danby in 1679. When required to give his answer to the charges brought against him, he pleaded the King's pardon¹. The Commons then resolved that the pardon was illegal and void, and demanded judgement at the bar of the Lords, as against one who had pleaded a void plea². The quarrel branched off in various other directions, the Commons even denying, though in vain, the right of the Bishops to take part in the earlier stages of an impeachment in the House of Lords. It was ended for a time by the prorogation of Parliament. The principal question was finally set at rest by the Act of Settlement, in which it was declared 'that no pardon under the Great Seal of England shall be pleadable to an impeachment by the Commons in Parliament³.' The power of the Crown to pardon, after the Lords have given judgement, is not affected by these words, but no pardon can be interposed between impeachment by the Commons and trial by the Lords.

A pardon cannot be pleaded in bar of an impeachment.

It may, perhaps, also be considered a general principle that neither prorogation nor dissolution of Parliament will put an end to impeachment by the Commons before the Lords. As early as 1673 it was resolved by the House of Lords, after enquiry by a committee, that ordinary judicial businesses depending in one Parliament or session of Parliament have been continued to the next session of the same Parliament, and the proceedings thereupon have remained in the same state in which they were left when last in

Question whether prorogation or dissolution can end an impeachment: contradictory resolutions.

¹ *Journals of the House of Lords*, April 25, 1679 (vol. xiii. p. 540).

² *Ib.*, May 5, 1679 (vol. xiii. p. 553).

³ Stat. 12 & 13 Will. III, cap. 2. sec. 3.

CHAP. XI. agitation¹. A few years later another committee reported to the House of Lords 'that the dissolution of the last Parliament doth not alter the state of the impeachments brought up by the Commons in that Parliament,' and the House resolved accordingly². In this, however, as in many other cases, the Lords reversed their own decision³, political motives obviously having no little weight.

The question whether even a prorogation would not put an end to an impeachment seems afterwards to have been brought into doubt, as in the case of the Earl of Oxford in 1717 it was thought necessary, after a search for precedents, to make a resolution in the negative⁴. There would *a fortiori* have been a doubt in case of a dissolution.

The doubt removed by special Acts of Parliament in the cases of Warren Hastings and Viscount Melville.

The difficulty was felt in 1786, when articles of impeachment were drawn up against Warren Hastings. It was then thought prudent to have an Act of Parliament passed to the effect that the proceedings should not be discontinued by any prorogation or dissolution of Parliament⁵. So also when Viscount Melville was impeached in 1805, another Act was passed in identical terms⁶. It is not improbable that these precedents would be followed upon any future impeachment, as each of these Acts had reference only to the particular case under consideration at the time. The points have often been argued, but would of course be subject to further argument on the introduction of any new Bill.

¹ *Journals of the House of Lords*, March 29, 1673 (vol. iii. p. 583).

² *Ib.*, March 19, 1678-1679 (vol. xiii. p. 466). The Order applied also to Appeals and Writs of Error.

³ *Ib.*, May 22, 1685 (vol. xiv. p. 11).

⁴ *Ib.*, May 25, 1717 (vol. xx. p. 475).

⁵ Stat. 26 Geo. III, cap. 96.

⁶ Stat. 45 Geo. III, cap. 125.

CHAPTER XII.

RIGHTS AND PRIVILEGES IN GENERAL OF THE HOUSE OF LORDS,
AND OF ITS MEMBERS; DISABILITIES.

THE rights and privileges now enjoyed by Peers and Lords of Parliament are not all identical with those which they enjoyed in former times. CHAP. XII.

It has already been seen incidentally that the right even to sit in the House of Lords in a particular order of precedence was slowly developed out of the burden of a writ of summons calling an unwilling Baron or Bishop to attend the King in Parliament. It has also been shown that the desire of the Barons to be summoned which appears in John's Great Charter was prompted only by the desire for protection when some exceptional tax was to be imposed.

Modern and ancient privileges not all identical. Right to sit in the House of Lords an instance.

For some generations afterwards it was thought a privilege, not to sit in Parliament, but to be exempt from attendance. This is equally true with regard both to the lay Barons and to the Prelates. Perhaps, however, the fact ought to be established by more details than have yet been given.

In the reigns of Edward I and Edward II one summons to Parliament was not necessarily followed by a subsequent summons of the same person or his descendants. Though the principal reason may have been that the King did not desire or need the presence of the Baron, another reason was that the Baron did not desire to be present. There are even instances in which men who had been summoned, and whose ancestors had been summoned to Parliament, were ready to deny that they were Barons at all. In the reign of Edward II, Thomas de Furnivall tried to show that he was

Efforts of lay Barons to escape summons and sitting: instances.

CHAP. XII. not a Baron¹, nominally to escape a particular amercement, though his ancestor had been amerced as a Baron in the reign of Richard I². He and his descendants were nevertheless summoned to Parliament for some generations, as his ancestors had been before him; and his barony is one of the few which can be shown to have developed out of a so-called 'barony by tenure' into a so-called 'barony by writ.'

An indication that the temporal lords regarded the summons to Parliament as a burden rather than an honour or a privilege as late as the twenty-seventh year of Edward III is to be found in an exemption then granted by the King to James de Audley. He was, 'during his whole life, to be quit of coming to our Parliaments and Councils and those of our heirs³.' There are also other and still later instances which show that even when lay lords were disposed to stand upon their dignity and their rights in Parliament, there were some, at any rate, who were anxious to escape the burden of sitting.

Efforts of
Prelates to
obtain ex-
emption :
instances.

The Prelates were at first, at least, as reluctant as the lay lords to attend in Parliament. Even towards the end of the reign of Edward III the Prior of Lewes, whose name appears in some earlier writs of summons to Parliament, desired immunity from attendance. Upon inspection of the Chancery rolls it was found that no Prior of Lewes had been summoned before the fourth year of Edward II, and that the Prior of Lewes had not been summoned on every occasion since that time. His name had been inserted among those of the other Prelates summoned, because he was willing (*voluntarie*) and not as of right (*de jure*). The King therefore commanded that his name, where inserted in the rolls, should be 'withdrawn, cancelled, and deleted,' so that in future the Prior for the time being should not

¹ Exchequer, L. T. R. *Remembrance Roll*, 19 Ed. II, *Communia*, Rot. 3 (printed in Madox's *History of the Exchequer*, chap. xiv. § 2). See also Madox's references to show that Furnivall really held by barony.

² Eyre Roll, Hertford, 10 Ric. I, m. 2 d (printed among the *Rotuli Curiae Regis*, i. 169).

³ *Rot. Lit. Pat.*, 27 Ed. III, part i. m. 13 (printed, *Rep. Dig. Peer*, vol. iv. p. 596).

be summoned to Parliament, but should be altogether discharged and quit of his coming¹. CHAP. XII.

The case of the Abbot of Gloucester also clearly shows that in the twenty-sixth year of Edward III attendance in Parliament and in Councils was regarded as a burden rather than as an honour by some of the Prelates. The King in his Letters Patent then says: 'On account of the special affection which we bear and have towards the Church and Abbey of St. Peter of Gloucester, in which the body of the Lord Edward, late King of England, of famous memory, our father, lies buried, we, willing to show special grace to our beloved in Christ Thomas, now Abbot of that place, have granted, for ourselves and our heirs, to the same Abbot, that he, during his whole life, may appear in all Parliaments, Assemblies, and Councils by his proctor or attorney, having full power to consent to the matters which may chance to be done in the same Parliaments, Assemblies, and Councils of the Common Council of our Realm, and that he be in no wise compelled to appear in person².' Other Abbots also had similar exemptions.

Even in the reign of Richard II it was found necessary to pass an Act of Parliament to secure the attendance of the Lords as well as of the Commons. It was, no doubt, to a great extent declaratory, but it suffices to show that all the Lords did not even yet look upon the summons to Parliament as a privilege. Every one who received that summons ('Archbishop, Bishop, Abbot, Prior, Duke, Earl, or Baron') and who absented himself when summoned, was, unless he could reasonably and honourably excuse himself to the King, to be amerced and otherwise punished according to the ancient custom³. Act of Richard II to enforce attendance.

When, however, the creation of Dukes, Marquesses, Viscounts, and even Barons by Letters Patent became a common practice, there grew up among the Peers, and The idea that the summons was a right

¹ *Rot. Lit. Claus.*, 39 Ed. III, m. 32 (printed, *Rep. Dig. Peer*, vol. iv. p. 638). But a Prior was summoned in 1 Edward II.

² *Rot. Lit. Pat.*, 26 Ed. III, part i. m. 20 (printed, *Rep. Dig. Peer*, vol. iv. p. 593).

³ 5 Ric. II, stat. 2. cap. 4.

CHAP. XII. particularly among the Barons, a desire for precedence, which was probably fostered by their increased power in relation to the Crown during the Wars of the Roses. Henry VI, as is shown in another chapter, was frequently induced to interfere in relation to questions of precedence ; and precedence came to be associated with a particular place in the House of Lords. That which had formerly been regarded only as a burden thus came to be more closely associated with the ideas of dignity and privilege. The growing influence of the House of Commons, too, was probably not without its effect. If the higher ranks of the peerage could assert their position above the lower ranks, and the Barons of early origin above those of later origin, even those of latest origin could assert a position superior to that of the Commons. The Peer's place in the House of Lords became the outward and visible sign of his place in the kingdom. He began to look upon his summons as a right of which he would not willingly be deprived. Early in the reign of Henry VIII he took pride in having his presence mentioned in due order of precedence in the Journals of the House of Lords. Thus by degrees the old order of things gave way to the new, and the once hateful summons to Parliament became a source of joy, though there still continued to be gradually diminishing punishments for non-attendance.

The 'right' to the writ of summons in the time of Charles I : case of the Earl of Bristol.

In the reign of Charles I the Lords had completely forgotten the reluctance of their ancestors to sit in Parliament. The summons to Parliament was, in their view, one of their rights. Certain accusations had been made against the Earl of Bristol, who was neither tried for his supposed offences nor summoned to Parliament. He presented a petition to the Lords, and the committee to which it was referred reported that there was no instance on record in which a Peer capable of sitting in Parliament had been refused his writ¹. It is impossible to imagine a greater contrast than that between Thomas de Furnivall trying to

¹ *Journals of the House of Lords*, March 22, 1625-1626 (vol. iii. p. 537). *Parliamentary History*, vol. ii. pp. 74-75.

prove that he was not a Baron in the reign of Edward II, and the Earl of Bristol, three centuries later, endeavouring to force the King to send him a summons. CHAP. XII.

The subject is one which possesses more than a merely antiquarian or historical interest, because it has an important bearing upon the question, sometimes discussed, whether any one succeeding to a peerage of the United Kingdom can remain or be newly elected as a Member of the House of Commons if he abstain from demanding his writ of summons to the House of Lords. If the summons were an instrument devised entirely for the good of the person summoned, he might, perhaps, have it or not at his pleasure. As, however, its origin is totally different, the subject must be regarded from a different point of view.

As shown in another page, it has been held that one claiming privilege of peerage in a Court of Justice cannot have it allowed without producing evidence that he is a Peer. The doctrine might, perhaps, even be carried further by analogy, and extended to everything by which anything could be gained for the particular individual. Still, with reference to a constitutional principle, it is not merely the individual that must be considered, nor merely his relation to the House of Commons, but his relation to the constitution as a whole.

In the old feudal times the death of a tenant-in-chief of the Crown was followed by an inquisition, in which the name and the age of the next heir were stated. Upon the return of the inquisition the Crown became informed of the facts, and the summons to Parliament could issue. When the feudal tenures were abolished the inquisitions *post mortem* ceased, and consequently the Crown ceased to be officially informed of the name of the next heir. Before this happened the idea that a summons to Parliament was a privilege or a right had overborne the idea that it was a burden. Peers therefore sought to be summoned instead of avoiding a summons.

Thus when a Peer, who is one of the hereditary Lords of Parliament, dies, the heir (or some person on his behalf)

The question whether a Peer can abandon his peerage by omitting to demand a summons.

Proof of peerage necessary, when privilege was claimed in Courts.

The Crown officially informed as to the heir by the feudal inquisition.

CHAP. XII. applies to the Lord Chancellor for his writ of summons, and produces the necessary evidence that he is in fact the heir¹. He could, of course, omit to make the application, and if it were held that there could be no summons to a Peer by descent who neglected to ask for it, the conclusion might possibly follow that he would not be disqualified for a seat in the House of Commons. According to Statute², the Speaker, if he receive, during a recess of the House, a certificate that a writ has issued to summon a member of the House of Commons to Parliament as a Peer, is to send forth his warrant to the Clerk of the Crown to make out a writ for the return of a new member.

The modern practice of application to the Chancellor for a summons.

The summons to the House of Lords and the seat in the House of Commons.

The summons to the House of Lords is here made an essential factor in vacating the seat in the House of Commons. Precedents have also occurred during a session of Parliament. Thus, when a writ had issued for the return of a new member for the borough of Stamford, on the supposition that General Bertie had become Earl of Stamford, and the House of Commons was informed on February 15, 1809, that no writ of summons to the House of Lords had issued, a *Supersedeas* of the writ for the return of a new member was ordered³.

The questions hence arising seem to be for the advisers of the Crown and the House of Lords.

From one point of view, therefore, it may seem that the vacancy of the seat in the House of Commons depends not merely upon the inherited right to a peerage, but also upon the actual issue of the writ of summons to the Upper House. But, on the other hand, from this point of view, the rights of the Crown and the privileges of the Lords are both shut out. If the parish registers instituted by Thomas Cromwell in the reign of Henry VIII, and the registers established by the later Registration Acts, have taken the place of the inquisitions *post mortem* as evidence of heirship, does it necessarily follow that the constitution is altered with

¹ May's *Law and Usage of Parliament* (10th edition), p. 149, note 3, and p. 598, note 2.

² 24 Geo. III, Sess. 2. cap. 26, sec. 2. See also 15 Geo. III, cap. 36.

³ *Journals of the House of Commons*, lxiv. 49; May's *Law and Usage of Parliament* (10th edition), p. 597.

regard to the position of the Lords? The inquisition was formerly returned officially into the Chancery; the certified extracts from the registers are now sent by the person interested to the Lord Chancellor. The baronage formerly owed suit to the sovereign's feudal court; but the sovereign's feudal court no longer exists. Can it then be maintained that the Crown has lost the right to require the attendance of a Peer *de jure* in his place in Parliament, or that a Peer *de jure* may, without surrender¹, abandon the privileges of peerage? Those questions cannot be answered here, though the course of events has brought them, as questions, within the domain of history. The one appears to be a question for the advisers of the Crown, the other, according to the precedents, for the House of Lords itself. In relation to this subject it may, however, be remarked that a member of the House of Commons who becomes by descent a Peer of Scotland, immediately vacates his seat, though he neither applies for nor is entitled to any writ of summons, and has not to establish his peerage to the satisfaction of the Lord Chancellor². Moreover, if a member of the House of Commons be newly created a Peer, his seat is vacated when (though not before) the Letters Patent of creation have passed the Great Seal.

It was long before the principle was evolved that the House of Lords could determine matters relating to its own privileges, including matters relating to attendance. The history of this doctrine runs indeed almost parallel with the development of the idea that a summons was a privilege out of the idea that it was a burden. In the reign of Edward III it was supposed, by some at any rate of the Judges, that any matter relating to attendance was within the cognizance of the Court of King's Bench. The Bishop of Winchester was there called to answer because, after having come to Parliament in obedience to a summons,

Non-attendance in Parliament supposed to be punishable in the King's Bench in the reign of Edward III: case of the Bishop of Winchester.

¹ As to surrender of dignities of the peerage, see below, pp. 269-272.

² May's *Law and Usage of Parliament* (10th edition), p. 598; *Journals of the House of Commons*, Feb. 21, 1840 (vol. xc. p. 105), and Feb. 5, 1861 (vol. cxvi. p. 4); Hansard's *Debates*, 3rd series, lii. 435-477.

CHAP. XII. he had departed without the King's permission. The Bishop appeared in Court in person. His counsel practically claimed privilege, and denied the jurisdiction of the King's Bench. The Peers, he said, met in Parliament for the profit of the King and the people, and therefore when one of the Peers did not come, or, having come, departed without leave, the fault was committed as much against the people as against the King. In matters touching Parliament the Peers were judges, and if one departed without the King's permission, it was a matter for them to record. He submitted that cognizance could not be had in a lower Court of that which had occurred in a higher. Scrope, the Chief Justice, took a different view. 'Those,' he said, 'who are judges of Parliament are judges of their peers, but the King has no peer in his own land, and therefore the matter ought not to be judged by them, and cannot be judged anywhere but here; and it is the King's pleasure to make suit against those who trespass against him wheresoever he may choose; therefore be advised.' No judgement, however, was given on this occasion. There was an adjournment, and the sequel does not appear¹.

Later orders made by the House in relation to attendance.

The House itself afterwards made many orders relating to attendance, which was not always very regular even after the summons to Parliament had beyond all doubt been recognized as an honour. Occasional absence soon came to be regarded as a venial offence punishable by the not very severe fine of five shillings for every day, unless a good excuse could be given². A fine was also imposed upon a Peer who, though attending, came after prayers³. Absence at the first meeting of a Parliament, however, was long considered far more serious, as might have been expected from previous history. In the reign

¹ *Year Book*, Easter, 3 Ed. III, ff. 18-19, no. 32. The record is in the *Placita coram Rege*, Easter, 3 Ed. III, R. 9 d. It is printed *in extenso* in 4 Inst. 15-16.

² *Journals of the House of Lords*, Feb. 25, 1625-1626 (vol. iii. p. 507).

³ *Ib.*

of Charles I it was resolved that an order should be drawn CHAP. XII.
 'whereby the Lords may know the danger they incur of
 being absent except they have leave of the King ¹.'

By special leave from the King a Lord of Parliament might, as we have seen, be excused from attendance in Parliament for life on appointing a procurator, or proxy, to represent him. He might also, by licence, appoint a proxy for particular occasions to give a vote on his behalf. Here again may without doubt be traced the original idea that attendance in Parliament was a burden, rather than an honour, as proxies were made at a very early period. Sometimes, as, for instance, when an aid was wanted for knighting the King's eldest son, appearance by attorney or proxy was even suggested in the writ of summons ². Sometimes, as, for instance, when a Crusade was in contemplation, notice was given that no proxies or bearers of excuses would be admitted except upon 'evident and manifest necessity ³.' At first it was not even necessary that the proxy should be a Prelate or a Temporal Peer ⁴, though it was necessary in the fifteenth century, and other restrictions were afterwards imposed. In later times orders were made by the House of Lords itself that no proxy should vote upon a question of guilty or not guilty when there was a trial by Peers.

Privilege
of making
proxies :
gradually
restricted
and at last
discon-
tinued.

Two or more proxies might, in the reign of Elizabeth, be made by an absent Peer, but they could not vote unless they all agreed ⁵. It was also already held that, if a Peer, after making a proxy, attended personally in Parliament, the proxy was revoked ⁶. A sharp division was drawn between Lords Spiritual and Lords Temporal in relation to proxies

¹ *Journals of the House of Lords*, Feb. 25, 1625-1626 (vol. iii. p. 507).

² *Rot. Lit. Claus.*, 34 Ed. I, m. 15 d (printed in *Rep. Dig. Peer*, vol. iii. pp. 165-166). Abbesses were summoned on this occasion.

³ *Rot. Lit. Claus.*, 6 Ed. III, m. 37 d (printed in *Rep. Dig. Peer*, vol. iv. p. 408).

⁴ See the Proxies of the year 1322, printed in *Parliamentary Writs*, vol. ii. div. 2. p. 248 and p. 267.

⁵ 4 Inst. 12.

⁶ 4 Inst. 13.

CHAP. XII. in the reign of Charles I. It was then ordered by the House 'that all proxies from a Spiritual Lord shall be made unto a Spiritual Lord, and from a Temporal Lord unto a Temporal Lord¹.' It was at the same time resolved that no Lord of the House should be capable of receiving more than two proxies².

In 1810 the idea that the King's licence was necessary, even in theory, for the making of a proxy, seems to have been quite forgotten. The 'King's illness' in that year, when George III, through mental incapacity, was unable to sign a commission for a further prorogation of Parliament (which had been formally prorogued until the 1st of November, but was not expected to meet on that day), caused many difficulties, and led incidentally to a consideration of the subject of proxies. A committee was appointed to enquire whether they could then be used. Its report was read on January 4, 1811, and was to the effect that there was no precedent except one in 1788-9, when proxies had been admitted before a commission had been read for holding a Parliament. A motion 'that proxies be now called over' was negatived by a majority of three. The subject was revived on January 4, and again on January 8. On the 23rd the Chancellor pointed out an error in the Report of Committee, as proxies had been entered on March 30 and June 2, 1660, as well as in 1788-9. He said, however, that 'he did not mean to argue the question as applying to the case of the two Houses assembling without the authority of the King's commission, but having assembled by virtue of a prorogation, under the authority of the King's commission, he contended that the right of voting by proxy attached to that House in common with other privileges;' and he proposed four resolutions in that sense. The Earl of Moira moved that the House do now adjourn, and his amendment was carried by a majority of two.

¹ *Journals of the House of Lords*, Feb. 25, 1625-1626 (vol. iii. p. 507).

² *Ib.*

In the course of the debate, the inherent right of a Lord of Parliament to vote by proxy was maintained without reservation on the one side, while on the other side it was insisted that the House had power to limit, modify, and control the privilege. No one seems to have supposed that there was any necessity for the royal licence¹.

The subject has now, however, lost much of its interest, because the Lords have themselves practically abandoned their own privilege. In 1867 it was recommended by a Committee of the House that the use of proxies should be discontinued; and on March 31, 1868, the House agreed to a Standing Order to carry out the recommendation: 'that the practice of calling for proxies on a division shall be discontinued, and that two days' notice be given of any motion for the suspension of this Standing Order².

The privilege, if privilege it can be called, of having entered upon the Journals of the House the protest of any individual Lord of Parliament against any vote which may have passed, is sometimes said to be of comparatively late origin. This is true to the letter, because the Journals of the House of Lords did not branch off from the older Rolls of Parliament until the reign of Henry VIII, and consequently nothing could have been entered upon them before that time. It must, however, be obvious that, in any assembly whatever, which has freedom of speech, it is competent for any member to make a protest on any subject whatever, and that the recording or not recording of the protest when made must be in accordance with the rules of the assembly itself. As early as the reign of Edward III a most important protest was made by the Chancellor, the Treasurer, and some of the Justices who then had seats in the House, and was recorded on the Rolls of Parliament. It might, indeed, almost be regarded as a 'protest with reasons.' The dissentients expressed themselves as being not only opposed to the enactment of

Growth
of the
practice of
entering
dissent
upon the
Journals.

¹ Hansard's *Debates*, vol. xviii. 1, 752, 786, 805, 976.

² *Journals of the House of Lords*, March 31, 1868 (vol. c. p. 99).

CHAP. XII. certain Statutes, to which reference is made in another chapter, but also as being dissatisfied with the form of enactment, and declared the whole to be contrary to the usages of the realm¹. Neither the Chancellor (Sir Robert Bouchier) nor the Treasurer (Sir Robert Parning) was at this time summoned to Parliament, as holding by barony, but this fact seems immaterial, as the Council in Parliament sat among the Lords, and could hardly have had a privilege which the Lords had not. Moreover some protests made by Prelates against the Statute of Provisors and upon other occasions are entered on the Rolls of Parliament.

Partly, perhaps, through the long intervals between Parliament and Parliament in later reigns, this privilege, like the authority of the House of Lords in some judicial matters, fell almost into oblivion. In the time of Charles I it came again into prominence, and in the opinion of some persons was greatly abused². After the Restoration protests with reasons were not uncommon, and duly appear upon the Journals of the House³.

Privilege
of being
attended in
the House
by the
Judges and
others.

Among the privileges not of individual Lords but of the House collectively, there came to be included the right to be attended by the Judges of the Courts of King's Bench and Common Pleas, and such of the Barons of the Exchequer as were of the degree of the coif or had been made serjeants-at-law, and the Masters of the Court of Chancery, 'for their advice in point of law and for the greater dignity of their proceedings. The Secretaries of State, the Attorney and Solicitor General, and the rest of the King's learned Counsel being Serjeants were also used to attend the House of Peers, and have to this day,' says Blackstone, about the year 1765, 'their regular writs of summons issued out at the beginning of every Parliament ;

¹ *Rot. Parl.*, 15 Ed. III, no. 42 (vol. ii. p. 131). See above, pp. 195-6.

² Clarendon, *History of the Rebellion*, iv. 254.

³ *A Complete Collection of the Protests of the Lords* was made from the Journals of the House by Mr. J. E. T. Rogers, and printed in three bulky volumes. The editor, however, makes no reference to events earlier than the reign of Henry VIII, when the Journals began.

but, as many of them have of late years been members of the House of Commons, their attendance here is fallen into disuse ¹.

It has already been shown ² that in the reign of Edward I, and long afterwards, the Judges and others who were members of the Council were regularly summoned to 'Parliament,' and had their places assigned to them among the Lords. The form of summons to them differed slightly from that of the summons to the Prelates and from that of the summons to the Earls and Barons, but it was in no sense a summons to be in attendance upon the Lords Spiritual and Temporal. When the King sat with them in Parliament they transacted business there which had the authority of 'the King in his Council in his Parliament,' and there is nothing to show that the Lords were their superiors. When, however, the Council was separated from the Parliament in the reign of Richard II, the King in his Council in his Parliament was an assembly no longer known to the law, and though writs continued to issue to the Judges and others of the Council, as before, their status naturally underwent a change.

It is difficult to mention a precise date when the Judges first lost their ancient places in Parliament. It may have been in the reign of Richard II, it was certainly before the reign of Henry VIII. When his 'Act for placing of the Lords' ³ was passed, no mention was made of them, though provision was made ⁴ for the case of a Lord Chancellor, Lord Treasurer, Lord President of the Council, Lord Privy Seal, or Chief Secretary, who might be under the degree of a Baron. When they lost their seats in the House of Lords, the Judges, having to give their advice only if required, naturally fell into a subordinate position. On June 4, 1660, just after the Restoration, it was ordered by the House of Lords 'that the Lord Chancellor do move his Majesty that he would be pleased to give order for writs

CHAP. XII.
The privilege of late growth: the Judges formerly sat in the House of Lords.

Order for Judges to attend as Assistants in the reign of Charles II.

¹ 1 Com. 168.

² Above, pp. 47-48, 195-196, &c.

³ Stat. 31 Hen. VIII, cap. 10.

⁴ Sec. 8.

CHAP. XII. to the Judges, whereby they may attend in the House as *Assistants*¹.

The House of Lords can now call for their assistance.

Breach of privilege of Parliament : opinion of the Judges in 1453.

The Lords can always call for the assistance of the Judges, and have frequently so called, especially in questions relating to the peerage.

Matters touching breach of privilege of Parliament constitute no inconsiderable portion of parliamentary law. Many of them relate rather to the House of Commons than to the House of Lords, and it is not within the scope or limits of this history to treat them in detail. There are, however, some of them which cannot be passed over altogether in silence.

In the reign of Henry VI the Lords were in some doubt with regard to their power in reference to breaches of the privilege of Parliament, though it seems to have been admitted that the power which was not in the Courts of Justice was entirely in the House of Lords, and not in the House of Commons. Chief Justice Fortescue, replying, on behalf of all the Justices, to a question submitted to them by the Lords, said that they 'ought not to make answer, for it hath not been used aforetime that the Justices should in any wise determine the privileges of this High Court of Parliament. For it is so high and mighty in its nature that it may make law, and that that is law it may make no law, and the determination and knowledge of that privilege belongs to the Lords of the Parliament and not to the Justices².'

Remarkable features of the case, as affecting the Speaker.

One of the most remarkable features in this case is that the determination of privilege of Parliament in general, and not of the House of Lords alone, was said to rest with the House of Lords. The Commons made a petition to the Lords on behalf of Thomas Thorpe their Speaker, and Walter Rayle, both described as Members of Parliament, and then in prison. The Duke of York had brought an action against Thorpe for having carried away certain

¹ *Journals of the House of Lords*, June 4, 1660 (vol. xi. p. 52).

² *Rot. Parl.*, 31 Hen. VI, nos. 25-28 (printed, vol. v. pp. 239-240).

goods and chattels belonging to him from the palace of the Bishop of Durham. He had been compelled to proceed in the Exchequer because Thorpe was 'one of the Court,' and had the privilege of being impleaded there and not in any other Court. Judgement was given for the Duke, with damages of £1000 and costs; and Thorpe was 'according to the course of the law committed to the Fleet for the fine belonging to the King in that behalf.' CHAP. XII.

The Duke opposed the liberation of Thorpe, and the Lords Spiritual and Temporal 'opened and declared to the Justices the premises and "axed"¹ of them whether the said Thomas ought to be delivered from prison by force and virtue of the privilege of Parliament, or no.' They then gave the well-known answer quoted above.

The Judges nevertheless added some qualifying words which ought not to be left out of consideration: 'There be many and divers *Supersedeas* of privilege of Parliament brought into the Courts, but there is no general *Supersedeas* brought to surcease of all processes; for, if there should be, it should seem that the High Court of Parliament that ministreth all Justice with Equity should "let"² the process of the common law, and so it should put the party complainant without remedy, for so much as actions at common law are not determined in this High Court of Parliament. And if any person that is a member of this High Court of Parliament be arrested, in such cases as be not for treason, or felony, or surety of the peace, or for a condemnation had before Parliament, it is used that all such persons should be released of such arrests and make an attorney, so that they may have their freedom and liberty freely to intend upon the Parliament.'

The Lords Spiritual and Temporal took the whole statement of the Judges to imply that they were the supreme arbiters with regard to privilege of Parliament and its consequences. They resolved that Thorpe should

The Lords then supreme arbiters of privilege as affecting both Houses.

¹ The entry upon the roll is in the English of the period.

² *I. e.* obstruct.

CHAP. XII. remain in prison notwithstanding any privilege of Parliament, and notwithstanding the fact that he was 'Speaker of the Parliament ¹.' Their resolution was strictly in accordancé with the established view that all judgements in Parliament or of the King in Parliament were those of the Lords or of the King and Lords. The Commons accepted the position, and, without more ado, elected a new Speaker.

Matters touching either House afterwards decided by that House alone.

In the time of Sir Edward Coke it was the received opinion that 'Judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws, but according to the law and custom of Parliament ².' The doctrine had, however, been further developed, and the determination of all privileges of Parliament was now no longer thought to belong to the Lords alone. It was already an accepted maxim that every question specially affecting either House of Parliament ought to be decided in the House to which it relates, and not elsewhere ³.

Power of the House of Lords to determine all cases of privilege on appeal from inferior Courts.

In later times there have been some contradictory decisions with regard to the relation of the Courts of Justice to the privileges of Parliament. Most of them have had reference to matters with which the House of Commons was solely or chiefly concerned, and which have therefore but little bearing upon the subject of the present work ⁴.

¹ There were some elaborate arguments in relation to this case in the year 1811, upon the hearing of the cause *Burdett v. Abbott* in the King's Bench, though Lord Ellenborough, the Chief Justice, thought it had very little bearing on the question before the Court, 14 East, 1-163.

² 4 Inst. 15.

³ *Ib.* 363.

⁴ Matters relating to privilege of Parliament as affecting the House of Commons have been laboriously collected and set forth in Hatsell's *Precedents and Proceedings of the House of Commons*. Later cases in the Courts as affecting both Houses have been brought together in Sir T. Erskine May's *Law and Usage of Parliament* (10th edition); and the manner of dealing with breach of privilege by each House is illustrated pp. 61-92. According to Lord Ellenborough the power of either House to punish by imprisonment was to be inferred from the Statute, 1 James I, cap. 13. See 14 East, 143 (*Burdett v. Abbott*), where all the important cases before 1811 are cited.

It may, however, be remarked that one of two propositions CHAP. XII. must be true: either each House has the power of determining its own privileges without reference to the ordinary Courts of Justice, or it has not. If each House has that power it is certainly possessed by the House of Lords. If either House has not that power, and the Courts have in any cases a jurisdiction, the House of Lords still has the final decision, not only with regard to itself, but also with regard to the House of Commons. It is, in its judicial capacity, the final court of appeal from any Court before which a case would probably be brought. It would therefore have, in the last resort, precisely the power which Chief Justice Fortescue ascribed to it, of deciding upon all cases of alleged breach of the privileges of Parliament which could come before the Judges.

The House of Lords has a minor privilege, for the use of which occasion has not often arisen in recent times. When there is to be a conference between the two Houses, it prefixes both the time and the place of meeting, whether the desire for the conference originates with it or with the House of Commons ¹.

Privilege
with regard
to con-
ferences.

It is commonly said that Peers are individually hereditary counsellors of the sovereign, and that the Lords Spiritual and Temporal are collectively, when not assembled in Parliament, the permanent Council of the Crown ². If so, these are great privileges, but it is not quite clear that the warrant for them is anything more than the original constitution of the *Curia Regis*. That body consisted of the Lords, the great officers of State, and, perhaps, from time to time, some experts whom the King might wish to consult. It was rather, however, his desire for their advice than their desire to advise him which was the governing principle when he called them together. The position, too, was greatly altered when the Council separated from the Parliament in the reign of Richard II, and became

Privileges
external to
the House:
the Lords
regarded as
counsellors
of the
sovereign.

¹ May's *Law and Usage of Parliament* (10th edition), p. 413; *Journals of the House of Commons*, March 26, 1604 (vol. i. p. 154).

² *First Rep. Dig. Peer*, vol. i. p. 14, &c. &c.

CHAP. XII. that permanent body which in later times was known as the Privy Council. The position was further altered when feudal tenures were abolished, and the Lords ceased to be members of the King's feudal court.

The Lords at York in 1640, and at the Guildhall in 1688.

It was probably the idea that Peers were his hereditary counsellors which caused Charles I to summon them all to York in the year 1640, to give him advice when no Parliament was in existence. This was an unfortunate expedient, and if defensible in theory, was not considered applicable to the practical needs of the time¹. Another great meeting of Lords in Council was held at a not less critical period, when in 1688 James II had fled. They assembled not in virtue of any summons from any King, but of their own will. They were not the whole body of Lords Spiritual and Temporal, but only six Spiritual and twenty-two Temporal Lords. They placed themselves in communication with William Prince of Orange, and took upon themselves the duties and responsibilities of an interim government. On what supposed authority they acted it is difficult to determine. They were aiding in the deposition of one sovereign, and they could hardly, as yet, be called the Council of another, though they may possibly have believed themselves to be acting in that capacity.

Their acts not to be confounded with addresses from the House of Lords in Parliament.

Both the Council of Peers at York in 1640, and the assemblage of Lords at the Guildhall in London in 1688, met when no Parliament was sitting. Their acts, and especially those of 1688, must not be confounded with the right of the House of Lords in Parliament to present an address to the sovereign on any subject. They were the acts, in one case, of the Peers brought together by virtue of a non-parliamentary summons from the Crown—in the other case, of certain Lords meeting in a great emergency to consult as to the welfare of the realm.

Privilege of audience of the sovereign :

Every Peer, according to the generally accepted doctrine, has the right to demand an audience of the sovereign in relation to public affairs. The historical foundation of this

¹ Clarendon, *History of the Rebellion*, ii. 95.

appears to rest upon the accusations against Hugh le Despenser the elder, and Hugh le Despenser the younger, in the reign of Edward II. One of the articles was that they would not suffer the Magnates of the Realm, or the King's good counsellors, to speak with the King or approach him except in their presence¹. It is not, however, quite clear from this passage that every Peer and Lord of Parliament necessarily had the supposed right, because the word Council is used in many different senses, and the Despensers may have interfered to prevent the King from having a Council or counsellors except those of their own choosing. There may even be a doubt whether the Lords Spiritual are included in the term Magnates. Some passages in documents of the reign of Edward II are, perhaps, not altogether inconsistent with that opinion, but the words Prelates and Magnates are more commonly used to indicate two distinct classes.

CHAP. XII.
its his-
torical
foundation.

It is not easy to illustrate the exercise of this privilege, by trustworthy authorities from reign to reign. The manner in which it was exercised in the reign of George IV has been very clearly recorded by Lord Colchester, who, before his elevation to the peerage, was Speaker of the House of Commons. It was the opinion of himself and Lord Sidmouth that the Peer who desired an audience should ask it individually for himself, and go singly. If more than one went at the same time, it was thought that there might be a semblance of besieging the sovereign by a strong minority of Peers. The mode of approach was not through the Secretary of State, but by application to some officer of the royal household². Lord Eldon, whose authority was of great legal weight, was disposed to limit the application of the privilege. He said that no Peer *can of right* carry an address or petition to the King in his closet, but can only tender advice³.

Opinions
on the sub-
ject in the
reign of
George IV.

¹ *Rot. Lit. Claus.*, 14 Ed. II, m. 14, *Cedula (Stat. Realm, i. 184)*, and

⁴ *Inst.* 53.

² *Diary of Lord Colchester*, March 7, 1829 (vol. iii. p. 604).

³ *Ib.*, March 12, 1829 (vol. iii. p. 606).

CHAP. XII. The Duke of Newcastle, at this time, when there was great agitation with regard to the Roman Catholic Bill, availed himself of the privilege. His request was made by a note to the Lord in Waiting, and was for leave to present an address and for an audience. He was immediately received by the King, with whom, after a long interview, he left the address together with other papers. The King also graciously desired the Duke to make known that he was ready to receive addresses from the hands of any Peer, and to give audience upon due notice¹. His willingness to receive addresses from individual Peers may, of course, have been merely a matter of grace, and, as Lord Eldon had said, not any indication of a right.

How exercised by the Duke of Newcastle.

Privileges in the King's Courts : amercement of Earls and Barons by their Peers.

A privilege of great antiquity, which was confirmed by John's Great Charter², came to be regarded as a burden at a later period. This was the privilege of Earls and Barons (the Prelates being included in the latter term) to be amerced by their peers. Thus if one of them was a loser in an action in a Court of Justice, he was said, like any other subject, to be 'in mercy,' or in other words liable to a fine of indefinite amount to be subsequently assessed. The assessment, in his case, could be made only by his 'peers,' but there may arise a question as to the definition of the word. The answer is practically given by Bracton. In describing proceedings before Justices in Eyre, he says, Earls and Barons are not to be amerced but by their peers—by the Barons of the Exchequer or before the King himself³. It seems to follow that the Barons of the Exchequer and the persons who constituted the Court *coram Rege* (but not the Justices in Eyre) were, as late as Bracton's time, considered to be the peers of Earls and Barons.

This privilege at least as

We are thus by a process of inference enabled to carry back this privilege to the reign of Richard I, or in other

¹ *Diary of Lord Colchester*, March 14, 1829 (vol. iii. pp. 606-607).

² *Mag. Chart.*, cap. 21.

³ Bract. 116 b.

words to the time beyond which memory runneth not. Certain rolls of that reign have been preserved to which the title of *Rotuli Curiae Regis* has commonly been given. The term is, in relation to some of them, and in particular to one which is now to be cited, a misnomer, except in so far as any of the King's Courts might be called '*Curia Regis*.' The Roll is clearly not that of the *Capitalis Curia Regis*, or either division of it, but that of the Justices in Eyre on their circuit. The privilege of Barons to be amerced by their peers is here made manifest, though it could not have been detected without Bracton's explanation.

CHAP. XII.

early as
the reign of
Richard I:
instances.

In this Eyre Roll occurs a list of amercements. In all instances, except two, the amount at which the amercement was assessed is set opposite the name of the person amerced and without any reference to the Exchequer. The two exceptions occur in the cases of Gerard de Furnivall and Reginald de Argenton. 'Gerard de Furnivall is to be amerced *at the Exchequer* for a disseisin.' 'Reginald de Argenton is to be amerced *at the Exchequer* for a disseisin¹.' In the latter case the words 'one hundred marks' are added, apparently as a suggestion. It was not, however, adopted at the Exchequer, as the sum which Argenton had to pay was only twenty marks². Gerard de Furnivall and Reginald de Argenton were both Barons, and both were amerced by their peers, the Barons of the Exchequer, while the commoner sort were amerced directly in the Court of the Eyre. The Justices in Eyre (or *Missi*) were not all peers of the *Capitalis Curia Regis*, though Geoffrey Fitz-Piers, or Fitz-Peter, who was the chief of them, was about to be, if he was not already, Chief Justice or Justiciary of England.

In the first year of the reign of King John also, long before his Great Charter, we find that Herbert Fitz-Herbert was the loser in an action of assise. He was therefore 'in mercy.' The roll shows that privilege was claimed. It

¹ Eyre Roll, Hertford, 10 Ric. I, m. 2 d (printed among the *Rotuli Curiae Regis*, i. 169-170).

² *Great Roll of the Exchequer*, 1 John.

CHAP. XII. bears in the margin the Latin words for 'Mercy. He is a Baron¹.'

The Barons of the Exchequer, or the King's Council, acted as Peers for the purposes of the assessment.

Though Barons, having this privilege, were commonly amerced by the Barons of the Exchequer, they were sometimes amerced by another tribunal which must also have consisted of their peers. Thus in the third year of the reign of Henry III the Justices in Eyre in the County of Kent were instructed that Earls and Barons who were 'in mercy' before them were to be amerced before the King's Council². This is, no doubt, the amercement which Bracton describes as *coram Rege*, the proceedings of the Council in the reign of Henry III being often with difficulty distinguished from those of the King's Bench, and often enrolled on the same rolls. About the forty-second year of the same reign Barons put in mercy in the Eyre also had the amercement assessed *coram Rege*³.

Amercements according to a fixed scale about the time of Edward I: Earls and Barons amerced in ordinary Courts of Justice.

The actual amercement, however, either by the Barons of the Exchequer, or *coram Rege*, very soon became rather a form than a fact. It became a recognized principle that Earls and Barons should be amerced according to a definite scale⁴, which may, in the first instance, have been fixed either by the Barons of the Exchequer or by the Council. As soon as this was adopted, Earls and Barons had their amercements assessed in the courts in which they fell 'in Mercy.' Thus as early as the eleventh year of Edward I there were Barons amerced in the Common Bench⁵. In

¹ An abridgement of the case is printed in the *Placitorum Abbreviatio*, p. 24, Hereford.

² *Rot. Lit. Claus.*, 3 Hen. III, m. 13, cited in Madox's *History of the Exchequer*, cap. xiv. sec. 2. note.

³ A '*cedula*' among the records of the Lord Treasurer's Remembrancer of the Exchequer, printed in Madox's *Baronia Anglicana*, p. 102.

⁴ This appears in the *Mirror of Justices*, cap. iv. sec. 25. Little as may be the value of the *Mirror* in relation to 'the Coming of the English' and King Alfred, it is a contemporary authority for the end of the thirteenth and beginning of the fourteenth century, and the statement as to amercements is fully confirmed by records and law reports.

⁵ Great Roll of the Exchequer, 11 Ed. I. *Item Essex et Residuum Surr.* cited in Madox's *History of the Exchequer*, cap. xiv. sec. 2. note.

the tenth year of the reign of Edward II also, Earls and Barons were amerced in the same Court, Abbots being included under the head of Barons¹. Among these was the Abbot of Croyland, who complained to the King in Council that he had been treated as a Baron without due warrant, and alleged that he did not hold any lands or tenements by barony or part of a barony. The matter was referred to the Court of Exchequer. Search was to be made among the Exchequer records, and the Justices of the Common Bench were to be consulted if necessary. Upon examination of the rolls it was found that the Abbot had been amerced as a Baron, in the preceding reign, by the Justices in Eyre². It is also clear, from a case in which the Earl of Arundel was concerned in the reign of Edward III, that when an Earl wrongly brought an action in the Court of Common Pleas, he was amerced in the recognized sum of one hundred shillings³.

It cannot, perhaps, be said that there was absolute uniformity of practice even as late as the reign of Henry VI, for on the one hand the Earl of Northumberland, in the first year, having made default on a writ of Right, was not amerced in the Common Pleas, but by the Peers⁴, and on the other hand, in the ninth year, Lord Fitz-Walter was amerced in the Common Pleas, as a Baron, in two several sums of one hundred shillings for two distinct reasons⁵. The Earl of Northumberland, however, seems to have been exceptionally treated, and many instances show not only that there was a regular scale of amercement for Peers, according to their rank, but that so long as the scale was duly followed, the amercement could be imposed in the Court in which it was incurred. In the reign of Edward IV a Duke was, upon nonsuit, amerced at ten pounds, and an

¹ Exchequer, *Originalia*, 10 Ed. II, m. 2, in *cedula*, printed in Madox's *History of the Exchequer*, cap. xiv. sec. 2. note.

² Exchequer, Treasurer's Remembrancer's *Remembrance Roll*, Hil., *Communia*, 12 Ed. II, R^o. 23, cited in Madox's *History of the Exchequer*, as above.

³ *Year Book*, 38 Ed. III, 31 (*Quare impedit*). And see 2 Inst. 28.

⁴ *Year Book*, 1 Hen. VI, fo. 7.

⁵ *Ib.*, 9 Hen. VI, fo. 2. no. 5.

CHAP. XII. Earl at a hundred shillings¹. A Bishop also was amerced at a hundred shillings², but this of course could be only in respect of his lay fee, or barony, as, according to Magna Charta³, no ecclesiastic could be amerced in respect of any spiritual benefice.

A Baron's word sufficient in the Exchequer in the reign of Henry II.

As early as the reign of Henry II (if the *Dialogus de Scaccario* is to be trusted on this point) the King's Barons (*Barones Regis*) had a privilege which is not unlike that of the later Peers, who upon certain occasions gave their word instead of taking an oath. When the King's debts were in demand, and payment was to be enforced, one who held a barony of the King was, after the summons of the Exchequer had been heard, only asked to say to the Sheriff, either in person or by his Steward:—'In respect of this sum and in respect of this summons I will do according to the award of the Barons of the Exchequer on the day of account⁴.' With this the Sheriff had to be content until the day came, though the procedure was very different in the case of inferior persons, who held nothing of the King in chief.

Earls and Barons exceptionally treated when 'essoiners.'

When Earls or Barons were essoiners (persons giving an excuse in a Court of Justice for the non-appearance of a party) they were, in the time of Henry III, treated differently from those of inferior rank. The essoin, however, gradually became a mere form, and then fell into disuse. It is therefore needless to pursue the subject further⁵.

When a Lord was a party in a civil action there had to be Knights upon the

A privilege of some importance in civil causes appears to have belonged, from a very early period, both to the lay and to the ecclesiastical lords. When one of them was a party it was the custom that there should be knights upon the jury, and if there were none, the 'array' could be success-

¹ *Year Book*, 19 Ed. IV, fo. 9. no. 10.

² *Ib.*, 21 Ed. IV, 77.

³ *Magna Charta*, 9 Hen. III, cap. 14.

⁴ *Dialogus de Scaccario*, lib. ii. cap. 19.

⁵ Full details relating to Earls and Barons as essoiners are given in Bract. 337 b, 351 b, and 352.

fully challenged¹. This practice led to some abuses, and was often a cause of serious delay, but it continued to be the law of the land until the year 1751, when an Act was passed providing that no challenge should be taken to any panel of jurors for want of a knight². CHAP. XII.
Jury until
the year
1751.

Freedom from arrest in civil actions was, from one point of view, a Parliamentary privilege enjoyed by both Lords and Commons, and for some time even by their servants. From another point of view it was a privilege enjoyed by the Lords when no Parliament was in existence. It was once of considerable importance. It belonged both to the Prelates and to the Temporal Lords, though the Prelates seem to have had it as Prelates and not necessarily as Peers³. It was a privilege, however, which in the case of Barons, at any rate, the Courts would not notice unless specially pleaded. 'They were not bound to know and could not know whether one was a Lord of Parliament, unless the fact were certified to them by writ out of the Chancery⁴.' The privilege was restricted in England to Peers and Peeresses of England, those of Ireland not enjoying it in England before the Union; and a writ of *Capias* actually issued in England in the reign of Richard II against the Countess of Ormonde, Peeress of Ireland, in an action of debt⁵. Freedom from arrest, though not taken away from the Peers, lost much of its significance when arrest on mesne process (before judgment was given) was abolished in all but certain special cases in the year 1838⁶. Its value has been still further reduced by subsequent legislation, so that comparatively few opportunities now occur for the exercise of the ancient privilege⁷. It never extended to criminal offences. Freedom
from arrest
in civil
actions;
little now
remaining
of this
privilege.

¹ *Year Book*, T., 13 Ed. III (Rolls Series), p. 290. Dyer's Reports, 1 & 2 Phil. & Mary, fo. 107. no. 27, *et alibi passim*.

² Stat. 24 Geo. II, cap. 18. sec. 4.

³ *Year Book*, T., 29 Ed. III, fo. 42.

⁴ Fitz-Herbert's Abridgement, *Exigent*, 2 (Mich., 36 Hen. VI).

⁵ *Ib.*, *Proses*, 224.

⁶ Stat. 1 & 2 Vict., cap. 110. sec. 1.

⁷ It appears to be still applicable when one having privilege of

CHAP. XII.

Freedom from outlawry in civil actions: the privilege ceased with the abolition of the outlawry in 1879.

Freedom from arrest carried with it freedom from outlawry in civil actions, for a purely technical reason. A writ of *Capias* (to take the person of the debtor or other defendant) was one of the stages in the process of outlawry, and as a Lord of Parliament could not be taken, it necessarily followed that he could not be outlawed on civil process. Peers and Lords of Parliament have, however, no longer any privilege in this respect, as outlawry in civil proceedings was abolished in the year 1879¹. The privilege did not, at common law, extend to all criminal proceedings, though with regard to some matters the Lords had special protection by Statute. Thus when the Statute of Provisors of 25 Edward III was confirmed and extended during the same reign, there was expressly enacted a saving clause in favour of the Prelates and other Lords of the Realm, so that their persons should not be subject to arrest by force of the Act². A Peer could, nevertheless, be not only arrested but outlawed also for treason, felony, or breach of the peace.

Other former advantages in Courts of Common Law.

In civil actions at common law a Peer had, at one time, some other advantages, which, however, were in part regarded as privileges of Parliament, and shared with members of the House of Commons. They were of a technical nature, and belonged to a mode of procedure long since obsolete. The necessity of proceeding by 'Original Writ' against a Peer had, while it existed, the effect of making actions against Peers more expensive, and consequently more difficult, and thus operated as a protection, at any rate, against frivolous proceedings, to which unprivileged persons were sometimes exposed.

Exemption from service on juries and appearance at Sheriffs' Tourns.

Among the minor privileges relating to Courts of common law is that of exemption from service on juries. In former times the name of a Lord of Parliament might be placed on a jury panel, and he might be challenged by

peerage neglects to obey a judgement or order, after having been served with due notice.

¹ Stat. 42 & 43 Vict., cap. 59. sec. 3.

² 38 Ed. III, stat. 2. cap. 1.

the parties, or might challenge himself. He was not, however, compelled to serve¹, and was discharged on giving proof that he was a Lord of Parliament². In later times Peers and clergymen have been expressly exempted by Statutes³. CHAP. XII.

Prelates, Earls, and Barons were also early declared exempt from attendance at the Courts known as Sheriffs' Tourns, in all ordinary cases. This, however, was hardly a privilege of peerage, as it was equally enjoyed by all men and women who were *religiosi* or 'religious professed'⁴, and it has long ceased to be of any practical value.

When Justices of the Peace acquired the power of taking recognizances from other persons to keep the peace or to be of good behaviour, they had no power over Peers in this respect. Peers and Peeresses could not be bound over in any place except the Courts of King's Bench and Chancery⁵. Privileges of Peers in relation to recognizances to keep the peace.

A very curious privilege was given to Lords of Parliament and Peers of the Realm in the reign of Edward VI. It can be understood, however, only by the aid of some little knowledge of the ancient doctrine of benefit of clergy. When a man was indicted for certain offences, the Bishop of the Diocese or Ordinary could claim him, if a clerk, and withdraw him from the jurisdiction of the King's Courts. The definition of a clerk appears at first to have been one who had the clerical garb, and the clerical tonsure. As, however, the ability to read was at one time almost restricted to the clergy, it came to be held that any man who could read should be regarded as a clerk, and might have benefit of clergy. From the time of Henry VI the accused had to be arraigned in the King's Court, and might then claim the benefit, either before trial, or after conviction as a 'clerk convict.' It is only the benefit as applied to a clerk convict with which we are now concerned. Privilege conferred in the reign of Edward VI: Benefit of Clergy.

¹ *Co. Litt.*, 156 b. ² *Year Book*, M., 48 Ed. III, fo. 30. no. 18.

³ Stat. 6 Geo. IV, cap. 50. sec. 2, and 33 & 34 Vict., cap. 77. sec. 9, Schedule.

⁴ Stat. Marl. (52 Hen. III), cap. 10.

⁵ 4 Bl. Com. 251.

CHAP. XII. In the reign of Henry VII¹ a distinction was drawn between persons actually in Holy Orders and those who were entitled to benefit of clergy solely as being able to read. Those in Orders were to be entitled to the benefit as before, and as often as they offended; those literate persons not in Orders who committed clergyable offences were to be entitled to it once only. Every such literate person, when convicted of murder, was to be branded with the letter M on the brawn of the left thumb, by the gaoler, in open Court, in the presence of the Judge, before being delivered to the Ordinary. Every such person convicted of felony was to be branded in like manner with the letter F. The distinction between offenders actually in Orders and those only able to read was abolished for a short time in the reign of Henry VIII, when it was enacted that the persons actually in Holy Orders should be burnt in the hand in the same manner as the lay clerks, and be in all respects in the same position as lay persons admitted to their clergy². The previous law, however, was restored in the reign of Edward VI. In all cases within benefit of clergy all persons were then to have it in the same manner as they might have had it before April 24 in the first year of Henry VIII³.

A Peer
might
commit
highway
robbery,
&c., once
without
punish-
ment.

At the same time Lords of Parliament and Peers of the Realm were accorded a very remarkable privilege. In any case in which any of the King's subjects might have benefit of clergy, as well as in addition for the crimes of house-breaking, highway robbery, horse-stealing, and robbing of churches, any Peer or Lord of Parliament was, upon claim made, to be held as a clerk convict who might make purgation. This, to use the words of the Act, was 'though he cannot read, without any burning in the hand, loss of inheritance, or corruption of his blood⁴.' While he escaped the burning in the hand, however, he could not, like a person in Orders, have benefit of clergy a second time for any cause.

¹ Stat. 4 Hen. VII, cap. 13.

² Stat. 28 Hen. VIII, cap. 1. sec. 7, and 32 Hen. VIII, cap. 3. sec. 8.

³ Stat. 1 Ed. VI, cap. 12. sec. 10.

⁴ *Ib.*, sec. 14.

Benefit of clergy, though it had in theory the effect of causing the clerk convict to be handed over to the Ordinary for purgation, practically meant exemption from punishment. In the reign of Elizabeth it was expressly enacted that any person admitted to benefit of clergy should be no longer delivered to the Ordinary but discharged by the Justices, who might, nevertheless, detain him in prison for any period not exceeding a year¹. The imprisonment, however, did not apply to Peers, whose trial by the Peers in cases of felony was saved to them by the Act of Edward VI²; and a Peer who could or who could not read might still have robbed one church or committed one highway robbery with impunity, though an ignorant peasant would have been hanged.

CHAP. XII.
Benefit of clergy until its abolition in 1827: special Act in 1841 to make Peers punishable as other subjects.

In the reign of George I an Act was passed to the effect that persons found guilty of certain felonies within benefit of clergy, and liable to be burnt in the hand, might instead be transported to America³. As, however, Peers and Lords of Parliament were not liable to be burnt in the hand their privilege remained unaffected. Benefit of clergy was abolished in the year 1827⁴, but without any express reference to the Act of Edward VI, and doubts arose, a few years afterwards, whether the section in favour of Lords of Parliament and Peers did not still remain in force. Another Act was therefore passed in the year 1841 to repeal the section. It was further specifically enacted that every Lord of Parliament or Peer, against whom an indictment for felony might be found, should plead to it, and should, upon conviction, be liable to the same punishment as any other of Her Majesty's subjects⁵.

For a short time in the history of England a Peer might lose his dignity for life through contempt of Court. In 1452 a very stringent Act⁶ was passed to compel attendance in Chancery, and before the King and Council. Any

Disability for life, for contempt of Chancery or Council, in 1452.

¹ Stat. 18 Eliz., cap. 7. secs. 2, 3. ² Stat. 1 Ed. VI, cap. 12. sec. 15.

³ Stat. 4 Geo. I, cap. 11. sec. 1.

⁴ Stat. 7 & 8 Geo. IV, cap. 28. sec. 6.

⁵ Stat. 4 & 5 Vict., cap. 22.

⁶ Stat. 31 Hen. VI, cap. 2.

CHAP. XII. 'person of the estate of Lord, as Duke, Marquess, Earl, Viscount, or Baron,' failing to appear in accordance with due process, was to forfeit all offices, fees, annuities, and other possessions which he had by grant from the Crown, and if he made a second default he was to 'lose and forfeit his estate and name of Lord, and his place in Parliament' for life. If he had nothing by grant from the Crown the penalty for the first default was loss for life of his place in Parliament, as well as of all his lands and tenements. This curious Act, however, expired at the end of seven years, and in later times a Peer was treated with remarkable courtesy by the Chancellor, whenever he had the misfortune to have a Bill in Chancery filed against him.

Subsequent
privileges
in the
Chancery :
their dis-
appearance
under new
practice.

Other persons received a peremptory writ of *Subpoena* to appear in Court ; the Peer received a 'Letter Missive,' from the Lord Chancellor, desiring him, in courteous terms, to give directions for due appearance to be made, on his behalf, to a bill of complaint which had been exhibited against him¹. If he failed to appear he was still entitled to some exceptional treatment. A Bill in Chancery, however, is no longer a mode of commencing a suit², and for that reason a Peer can no longer be apprised in the old form of the fact that it has been filed. The answer to a Bill in Chancery had to be made on oath by a commoner, but was made by a Peer on his honour. This privilege, however, has fallen into disuse along with the Bill and the Answer, though a Peer would still give his verdict on his honour, if sitting in judgement. When examined as a witness he always had to be sworn like other persons.

Privilege
in relation
to slander :
*Scandalum
Magna-
tum* : legis-
lation from

The growth of the privilege relating to that kind of slander which is commonly known as *Scandalum Magnatum* can be traced from its first origin. Early in the reign of Edward I an Act was passed to restrain inventors of tales likely to be the occasion of discord 'between the King and

¹ The form is given in the earlier editions of Daniell's *Chancery Practice*.

² Supreme Court of Judicature Act, 1875 (38 & 39 Vict., cap. 77), Sched. i. Order 2.

his people or some high personages of his realm.' If any one published any false news or tales which might have the effect of raising such discord, he was to be taken and detained in prison until he had produced their first author in Court¹. It can hardly be said that this law gave any exclusive advantage to Peers or Lords of Parliament, as its object seems to have been to prevent all kinds of dissensions which might arise from untrue reports of any kind. In the reign of Richard II another Act was passed, which more clearly defined the classes of persons who were to be specially protected. These were Prelates, Dukes, Earls, Barons, and other Nobles and Magnates of the Realm, the Chancellor, the Treasurer, the Clerk of the Privy Seal, the Steward of the King's Household, the Justices of the Courts of King's Bench and Common Pleas, and other great officers of the kingdom. Untrue statements as to their acts, words, or thoughts, which might create disputes and differences between the Lords among themselves, or between the Lords and Commons, were strictly prohibited on pain of the punishment provided in the previous Act. The reason assigned was that unless the evil were repressed, the whole realm would be in danger of subversion and destruction².

CHAP. XII.
Edward I
to Elizabeth.

The punishment provided in the Act of Edward I, however, appears to have been found inadequate, and another Act became necessary in the reign of Richard II. It was then enacted that if any person imprisoned as a disseminator of a false report could not discover its first author, he was to be subject to punishment as the Council might advise³.

In the reign of Philip and Mary some further enactments were made in relation to the slander of Magnates or other persons mentioned in the Acts of Edward I and the second year of Richard II. Power was given to Justices of the Peace to hear and determine these offences, and to put the

¹ Stat. Westm. I (3 Ed. I), cap. 34.

² 2 Ric. II, stat. 1. cap. 5.

³ Stat. 12 Ric. II, cap. 11.

CHAP. XII. Statutes in execution. A special punishment was assigned for slander of the King or Queen. In other cases the offender was to pay 100 marks, or lose one of his ears and be imprisoned for a month. For written slander his right hand was to be struck off. For a second offence he was to be imprisoned for life, and forfeit all his goods and chattels¹. This Act was continued by subsequent Acts, one of which was passed at the beginning of the reign of Elizabeth. So far as slander of the Sovereign is concerned, the law was expounded to extend to Elizabeth and the heirs of her body, and would therefore seem to have expired upon her death without issue. So far as others were concerned, however, it appears to have been in force until repealed by the Statute Law Revision Act of 1863.

Abolition of the privilege by repeal of Statutes in 1887: it was never exclusively a privilege of Lords of Parliament.

Apart from the actual punishment to be inflicted, the Statutes relating to *Scandalum Magnatum* survived until the year 1887. It is, however, to be borne in mind that although all Peers and all Lords of Parliament have been within the privilege or protection afforded by the law relating to *Scandalum Magnatum*, they have not had the exclusive enjoyment of it. All the great Officers of State were hedged round in the same manner, in order that the King's government might not be brought into disrepute by unfounded charges; and it was, without doubt, supposed in the fourteenth century that the King's government would suffer equally if Prelates and lay Lords were brought into contempt. Thus the Peers and Lords of Parliament, while sharing with the Commons some privileges which have been included under the head Privilege of Parliament, shared also with the great officers of State certain other privileges which may perhaps be called Privilege of Government or of Administration. These, so far as they relate to *Scandalum Magnatum*, were abolished by the Statute Law Revision Act of 1887, by which the Acts of Richard II are repealed²; and any one may now publish false reports, not only of

¹ Stat. 1 & 2 Philip and Mary, cap. 3, continued by 4 & 5 Philip and Mary, cap. 9, and 1 Eliz., cap. 6.

² Stat. 50 & 51 Vict., cap. 59.

Peers but of the great Officers of State, without incurring any penalties different from those which he would incur if he published false reports of any commoner or private individual. CHAP. XII.

A privilege highly valued, there can be little doubt, at one time, was that of taking deer in the King's forests. It was enjoyed as early as the reign of Henry III, if not before, by every Archbishop, Bishop, Earl, or Baron, when journeying to the King to obey the King's summons, and when returning home. Not more than two deer, however, might be taken, and those only in the presence of the forester, or after winding a horn in his absence¹. This, like many of the other privileges, has fallen into disuse through the altered conditions of life. Privilege in the King's forests.

All the privileges, external to the House, which were formerly enjoyed in England by the Peers of England or Lords of the Parliament of England exclusively, ceased to be their exclusive privileges after the Union with Scotland. The Peers of Scotland and the Peers of Ireland, who have no seats in the House of Lords (except those Peers of Ireland who have seats in the House of Commons), enjoy all the other privileges of Peers of the United Kingdom by virtue of the respective Acts of Union. No exclusive privilege to individual Lords of Parliament, except their seats, since the Union with Scotland.

It is sometimes asserted that Lords of Parliament had, in early times, the right of voting at elections of members of the House of Commons, or, at any rate, of Knights of the Shire. Theoretically it might be argued, on the one hand, that, as a Lord of Parliament has a seat of his own, he does not need any representative in Parliament, but, on the other hand, that as he suffers under a disability with regard to voting supplies, he ought to be represented by some one who is under no such disqualification. Practically the election for Knights of the Shire was in the County Courts², and it is hardly to be supposed that Lords of Lords of Parliament might formerly vote at elections of Knights of the Shire.

¹ *Charta de Foresta*, 9 Hen. III, cap. 11. This charter was repealed by the 7 & 8 Geo. IV, cap. 27. sec. 1, so far only as it relates to punishments for taking the King's venison.

² A common form of Sheriff's return to a writ for the election of

CHAP. XII. Parliament could be excluded, if they chose to attend as freeholders, though they could claim exemption from attendance at the Sheriff's Tourn. Where they cared to exert it, they probably had great influence. The mode of returning the names of the persons elected was very irregular, as appears from the complaints made and the Acts passed in consequence¹. Some of the returns which have been preserved show that among the electors were the attorneys or persons acting on behalf of Peers².

Resolutions of the Commons that the Lords have no right to vote or interfere in elections.

In this matter, however, as in various others, the Commons have, in later generations, taken the law into their own hands. In 1699, after the Earl of Manchester had voted at an election, they resolved 'that no Peer of this kingdom hath any right to give his vote at the election for any member to serve in Parliament³.' In 1702 the Commons further resolved 'that it is a high infringement of the liberties and privileges of the Commons of Great Britain for any Lord of Parliament or any Lord Lieutenant of any county to concern themselves in the election of members to serve for the Commons in Parliament⁴.' Both these resolutions were renewed, session after session, until the Union of Great Britain with Ireland.

After that Union, by the terms of which a Peer of Ireland might represent, in the House of Commons, a county or borough of Great Britain, these resolutions became no longer suited to existing facts, and a committee was appointed to report upon the subject⁵. The recommendations then made were adopted by the House, and the

members was 'The community of my whole county having been assembled, the following Knights were elected.' See e.g. Writs & Returns for the Counties of Middlesex and Rutland, 5 Ed. II (printed, *Parl. Writs*, vol. ii. div. ii. pp. 62, 64, &c.).

¹ E.g. Stat. 7 Hen. IV, cap. 15; 11 Hen. IV, cap. 1; 6 Hen. VI, cap. 4; 23 Hen. VI, cap. 14.

² Some of these have been printed by Prynne.

³ *Journals of the House of Commons*, Dec. 14, 1699 (vol. xiii. p. 64).

⁴ *Ib.*, Jan. 3, 1701-1702 (vol. ix. p. 654).

⁵ *Ib.*, Oct. 30, 1801 (vol. lvii. p. 5).

new resolutions which followed became Standing Orders¹. CHAP. XII.
One was 'that no Peer of this Realm, except such Peer of that part of the United Kingdom called Ireland, as shall for the time being be actually elected, and shall not have declined to serve for any county, city, or borough of Great Britain, hath any right to give his vote in the election of any member to serve in Parliament.' Another, in like manner, adapted the resolution of 1702 to the altered circumstances caused by the Union.

There has been no power to create or develop privileges, except by Act of Parliament, since the year 1705, if, indeed, any such power existed before. At a conference then held the Lords communicated to the Commons a resolution that neither House of Parliament had power 'by any vote or declaration, to create to themselves any new privilege that is not warranted by the known laws and customs of Parliament.' To this the Commons assented².
No power now in either House to create new privileges.

A Lord of Parliament has only one place in Parliament, and therefore cannot sit in the House of Commons. There does not seem to be any similar reason why he might not have been a member of a County Council without any special enactment on this subject. By the Local Government Act of 1888, however, it was provided that Peers might be members of a County Council if owning property within the county³. They thus escaped any possible disability.
Peers may be County Councillors by Act of Parliament.

Before the days of Charles I, a Peer might lose his dignity in various ways. He might, if of higher rank than a Baron, and if his title was by Letters Patent or Charter, divest himself of it by surrender to the King. Roger Bigod, Earl of Norfolk, and Marshal of England, surrendered his Earldom to King Edward I⁴. William Herbert, Earl of
Early doctrine that the higher dignities of the peerage could be lost by surrender: instances.

¹ *Journals of the House of Commons*, Nov. 17, 1801 (vol. lvii. p. 34), and April 27, 1802 (vol. lvii. p. 376).

² *Ib.*, Feb. 28, 1704-1705 (vol. xiv. p. 555).

³ Stat. 51 & 52 Vict., cap. 41. sec. 2 (2 b).

⁴ *Rot. Lit. Claus.*, 30 Ed. I, m. 14 d (printed, *Rep. Dig. Peer*, vol. v. app. v. p. 11).

CHAP. XII. Pembroke, restored into the Chancery the Charter by which his father had been created, in order that it might be cancelled¹. The real object of this proceeding was that Edward, son of King Edward IV, might be created Earl of Pembroke in his stead². William, however, while surrendering the particular Earldom of Pembroke, expressly reserved to himself the general state and dignity of an Earl, and was immediately created Earl of Huntingdon. In the reign of Henry VII, Edmond de la Pole, son of John, late Duke of Suffolk, agreed to surrender his estate of Duke, and that he should thenceforth be taken to be only Earl of Suffolk 'after such estate of inheritance as his ancestors were, afore the estate of Duke by the King's progenitors or predecessors to any of his said ancestors granted³.' In the reign of Henry VIII, Thomas, Duke of Norfolk, surrendered (for the life of his son) his Letters Patent by which he had been created Earl of Surrey in tail male; and thereupon his son had grant of the dignity for life⁴. The latter grant was confirmed by Act of Parliament⁵. In the same reign Charles Brandon, Viscount Lisle, surrendered his Patent of creation, in order that Arthur Plantagenet might be created Viscount Lisle⁶.

Not only were these surrenders made without any doubt of their validity at the time, but some of them were also held to be good by the Law Officers of the Crown in the reign of Charles II,—by John Glanville, the King's Sergeant-at-Law, by Geoffrey Palmer, the Attorney-General, and by Heneage Finch, the Solicitor-General⁷.

This did
not
necessarily
involve

In every case, however, it will be observed that the surrender was of some dignity higher than that of Baron—of an early Earldom which was once regarded as an office

¹ *Rot. Chart.*, 15-22 Ed. IV, no. 11 (printed, *R. D. P.*, vol. v. pp. 417-418).

² *Ib.*, 15-22 Ed. IV, no. 10 (printed, *R. D. P.*, vol. v., p. 419).

³ *Rot. Parl.*, 11 Hen. VII, no. 13.

⁴ *Rot. Lit. Pat.*, 5 Hen. VIII, part ii. m. 11.

⁵ *Rot. Parl.*, 5 Hen. VIII, no. 3.

⁶ *Rot. Lit. Pat.*, 15 Hen. VIII, part i. m. 26.

⁷ *Journals of the House of Lords*, July 16, 1660 (vol. xi. p. 93).

—of other honours conferred by Letters Patent which were returned into the Chancery. There had been no surrender of a barony—least of all of that which has been called a barony by writ. In every instance the person surrendering might still have remained a Peer, as holding a barony in addition to the dignity surrendered, and so far there seems to be no clear example of the surrender of the status of Peer of the Realm.

CHAP. XII.
loss of the
status of
Peer.

In the fifteenth year of Charles I, however, Roger Stafford, Esquire, levied a fine, to the King, of the honour, state, degree, dignity, and name of the barony of Stafford, in order to bar any claim which he might have to them. The barony (though not the Earldom) of Stafford was one of those known as baronies by writ. The fine was accepted by the King, and was held good by the Law Officers of the Crown in the year 1660¹. Nevertheless, there does not seem to have been any precedent for it, and it was not recognized by the Lords at the time at which it was made. They then resolved ‘that no Peer of this Realm can drown or extinguish his honour (but that it descend to his descendants)—neither by surrender, grant, fine, nor any other conveyance to the King².’

The fine
levied of
the barony
of Stafford
in the
reign of
Charles I:
Resolution
of the
House of
Lords.

Both the Law Officers and the Lords appear to have been under some misapprehension, and each side appears to have overstated its case. The precedents on which probably the Law Officers relied did not extend to a barony by writ; the objections against the surrender or other form of restoration to the Crown of a barony by writ, on which probably the Lords relied, did not extend to dignities granted by Letters Patent or Charter.

The Lords
and the
lawyers at
variance.

Ideas on the subject were thus in some confusion about the time of the Restoration, when the so-called Viscount Purbeck was also permitted to levy a fine of his honours. Eighteen years later, when his son laid claim to the Viscounty, the House of Lords declared their unanimous

The Pur-
beck case:
final
resolution
of the
House of
Lords, in
1678, that

¹ *Journals of the House of Lords*, July 16, 1660 (vol. xi. p. 93).

² *Ib.*, Feb. 1, 1640–1641 (vol. iv. p. 150).

CHAP. XII. opinion, and resolved and adjudged, that no fine then levied or at any time to be levied to the King could bar a title of honour, or the right of any one claiming such title under the person who had levied or should levy such fine ¹.

Question whether the Lords have the power to preclude the Crown from receiving a surrender.

The doctrine that a Peer cannot surrender, or in any other way restore any dignity at all to the sovereign, is thus Lord-made law of comparatively recent growth. It seems, at first sight, to contradict the fundamental doctrine that the sovereign is the fountain of honour, as it withdraws from him the power to receive back an honour once conferred. There must of necessity be two parties to a surrender, and it appears to be hardly within the rights of any particular body so to define its own privileges as to affect other interests, and in particular those of the Crown, without the express consent of the sovereign.

Instance of the transfer of an Earldom from subject to subject: it was only by favour of the King.

It has been suggested that in very early times a dignity could not only be surrendered to the King, but could, with the King's consent, be transferred to another person. In the reign of Henry III (as already mentioned²), Ranulf, Earl of Chester and Lincoln, conveyed to his sister, Hawise de Quency, the 'county' of Lincoln so far as it belonged to him³. The King, at the instance of Hawise, gave and granted to her son-in-law, John de Lacy, the third penny of the County Court of Lincoln, in the name of the Earldom of Lincoln (*which Ranulf had given to her* in the name of the Earldom of Lincoln), to be held of the King by John in special tail⁴. Thus Ranulf's gift to his sister was recognized by the King, and he acceded to her request in relation to the future settlement of the Earldom. It is, however, clear that, as no such transfer could be made without the King's consent, the whole transaction can only

¹ *Journals of the House of Lords*, June 18, 1678 (vol. xiii. p. 253); Shower's *Cases in Parliament*, 1-11.

² See above, pp. 62-64.

³ Charter printed in Selden's *Titles of Honour*, p. 653.

⁴ *Rot. Lit. Pat.*, 17 Hen. III, m. 9. no. 35 (printed, *Rep. Dig. Peer*, vol. v. app. v. p. 8).

be regarded as a new grant of the Earldom by the King at the request of subjects upon whom he looked with favour. CHAP. XII.

The alienation of a barony in the sense of an honour or dignity could hardly have been possible at any period. It is shown elsewhere that in early times 'Baron' was not a name of dignity like 'Duke' or 'Earl,' and that the omission of the word in describing one of the parties, in legal proceedings, was immaterial. There was in fact but little for the possessor to aliene. The Summons to Parliament, to which Barons holding by barony were liable, was not considered a thing of value. The summons of later times, which was held to give a peerage to the person summoned, and to the heirs of his body, could not give it to any one else. Letters Patent of creation themselves limited the succession and did not confer anything alienable, unless the principles of fines and recoveries could be rendered applicable.

No transfer of a barony.

A resolution of the Lords with regard to the alienation of a dignity appears therefore to have had better warrant than their resolution with regard to surrender. They resolved in the reign of Charles I, 'that no person that hath any honour in him, and a Peer of this Realm, may aliene or transfer the honour to any other person ¹.'

Resolution of the House of Lords in 1641 that no Peer could transfer an honour.

There is nevertheless something analogous to the transfer of a dignity, though only by licence from the sovereign, and only within the blood of the alienor, when the eldest son of a Peer is called up to the House of Lords in his father's barony. If, for example, an Earl holding the Earldom of Arundel holds at the same time the barony of Maltravers ², and his eldest son is summoned in the barony of Maltravers, it is plain that the barony is, from that time forward, in the son and not in the father. The father, however, loses the barony only for his own life, and when the son succeeds to

Effect of calling up to the House of Lords the eldest son of a Peer in his father's barony.

¹ *Journals of the House of Lords*, Feb. 1, 1640-1641 (vol. iv. p. 150).

² This happened in 1482 (*Rot. Lit. Claus.*, 22 & 23 Ed. IV, m. 10 d), and is believed to be the first instance of the heir being summoned during the lifetime of the Peer.

CHAP. XII. the Earldom he is in precisely the same position in which his father was before him. Should the son die before the father, leaving issue, his eldest son would have the barony, but neither would take it otherwise than in accordance with the limitations by which the father held it. When a Baron was first created by Letters Patent, with limitation to him and the heirs male of his body, and was afterwards summoned to Parliament, the summons did not supersede the patent and enlarge the grant to the benefit of his heirs general. So also the patent governs the summons in later generations, and the only effect of calling up a son to the House of Lords during his father's life, in his father's barony, is to hasten the descent of the dignity and temporarily to add one to the number of Peers.

The case is, of course, different when the son of a Peer is summoned to the House of Lords in a barony which his father does not possess. In that event the summons operates as a new creation, for the benefit of the person summoned and his lineal heirs; and this has been held to be the effect even when it has been supposed, though erroneously, that the barony was in fact held by the father.

Change in
the law of
Attainder :
greater
security to
heirs.

In more modern times it has commonly been said that a Peer can lose his nobility in three ways only, by death, by attainder, or by Act of Parliament¹. It does not seem that he can now lose it even by attainder in the same manner as he could under the old law, because it was enacted in the year 1870 that no confession, verdict, inquest, conviction, or judgement of or for any treason or felony, shall cause any attainder or corruption of blood². Thus the heirs of each individual Peer have been placed in a position of security which they never previously enjoyed. Except in the event of the outlawry and non-surrender of a Peer charged with treason or felony, or through the passing of some Act of Parliament, the heir must now always inherit the dignity.

Traitors
and felons
disquali-
fied.

A Peer, however, convicted of treason or felony, and sentenced would be disqualified for sitting or voting in the

¹ 1 Com. 403.

² Stat. 33 & 34 Vict., cap. 23. sec. 1.

House of Lords, until he had suffered his punishment or received a pardon¹. CHAP. XII.

The fact of being an alien has, since the Act of Settlement of the reign of William III, constituted a disqualification for a summons to the House of Lords. No person born out of the British dominions, unless born of English parents, can, even though naturalized, be a member of either House of Parliament². Aliens disqualified.

In former times insolvency or bankruptcy did not cause any disability, but since the year 1871 a Peer has been disqualified for sitting and voting in the House of Lords during bankruptcy, and no writ of summons to him will issue³. Bankrupts disqualified.

In early times there seems to have been no strict rule with regard to age, and, as has been shown in another chapter, the young Earl of Gloucester and Hertford was summoned to Parliament while yet a minor. He was, however, the grandson of one King, and the nephew of another, and it is possible that an exception was made in his favour for that reason. Edward, son of Edward I (the first Prince of Wales), his son Edward (afterwards Edward II), Edward, the Black Prince, son of Edward III, and Richard his son (afterwards Richard II), were all called to Parliament before attaining their majority. The House of Lords, however, on May 22, 1685, resolved 'that no Lord under the age of one and twenty years, shall sit in this House,' and that the resolution should be added to the Standing Orders⁴. Disqualification of minors.

There have been special instances in which sentences have been passed in the House of Lords itself, to the effect that one of their body should be incapable of sitting, as in the cases of Viscount St. Albans (Lord Bacon) and the Earl of Middlesex, which have been mentioned in another chapter. Here, however, as upon judgement for felony, the Crown may remove the disability by pardon. Exclusion by the House.

¹ Stat. 33 & 34 Vict., cap. 23. sec. 2.

² Stat. 12 & 13 Will. III, cap. 2. sec. 3.

³ Stat. 34 & 35 Vict., cap. 50.

⁴ *Journals of the House of Lords*, May 22, 1685 (vol. xiv. p. 10).

CHAP. XII.

Disability
under Acts
relating to
oaths.

From December 1, 1678, to April 23, 1829, the numbers of the Lords Temporal sitting in the House of Lords were somewhat diminished by the disqualification of Roman Catholics to sit, vote, or make a proxy. They were by Act of Parliament excluded¹ unless they would make, subscribe, and repeat a declaration which denied some of the principal tenets of their faith. In the reign of George IV, however, this portion of the Act was repealed, and Peers were allowed to sit and vote, upon taking and subscribing an oath, which was designed chiefly with the object of securing the loyalty of the subject to the sovereign as distinguished from the Pope². In 1866 a form of oath to be taken by members of both Houses of Parliament was set forth in an Act of Parliament. The omission to take it, however, does not seem to cause any absolute disability. 'If any member of the House of Peers,' it is provided, 'votes by himself, or by his proxy in that House, or sits as a Peer during any debate, without having made and subscribed the oath, he shall for every offence be subject to a penalty of £500, to be recovered by action in one of Her Majesty's Superior Courts³.'

Disquali-
fication
specially
affecting
Peers of
Scotland.

Since the year 1792 some of the Peers of Scotland might possibly have been under a disability which affected none but Scots. It was enacted that no Peer of Scotland should be capable of being elected one of the sixteen representative Peers, or of voting in the election of the sixteen, who had twice in any year been present at divine service in any episcopal place of worship in which prayers were not offered for the King, for his heirs and successors, and for the Royal Family⁴. This Act still remains law.

Schemes of
1888 and
1889 to
disable
Peers for
disgraceful
conduct.

Some efforts to free the House of Lords from disreputable persons were made in the years 1888 and 1889. In the former year the Marquess of Salisbury introduced a Bill, in which it was proposed that all Superior Courts in the United

¹ 30 Car. II, stat. 2. secs. 1 & 2.

² Stat. 10 Geo. IV, cap. 7. sec. 2.

³ Parliamentary Oaths Act, 1866, sec. 5.

⁴ Stat. 32 Geo. III, cap. 63. sec. 12.

Kingdom should report to the Lord Chancellor every case in which a Peer of Parliament had been proved to have been guilty of disgraceful conduct, inconsistent with his character as a member of the House of Lords, and that the Lord Chancellor should lay the report before the House. Upon presentation of an address from the House of Lords, the sovereign was to have power to direct that the writ of summons issued to any Peer should be cancelled, and that he should not be entitled to sit during the existing Parliament¹. CHAP. XII.

This Bill was withdrawn, not without an expression of regret from the Earl of Carnarvon², who in the following year introduced another Bill of a similar character, in which felony and misdemeanour were expressly mentioned³. When its second reading was moved it was set aside by means of the previous question⁴. Some of the clauses were considered impracticable; and as Peers convicted of felony were already disabled by Statute, it may have been thought that there was no need to legislate further on that subject.

The existing disabilities of Peers seem to have aroused some interest in the House of Commons, which has permitted the introduction of a Bill for their relief. It was presented on February 8, 1893. The proposals which it contained were that Peers of the Realm might be enabled to vote at elections for boroughs, counties, or universities, and might themselves be elected members of the House of Commons. In either case, however, they were to become commoners, and their hereditary titles were to lapse, and not to descend to their heirs. A Peer accepting the office of any of the principal Secretaries of State, First Lord of the Treasury or Admiralty, President of the Board of Trade or Local Government Board, or Chancellor of the Exchequer, was

Peers' Disabilities
Removal
Bill of
1893.

¹ Discontinuance of Writs Bill, H. L., 1888, no. 162; Hansard's *Debates*, 3rd ser., vol. cccxxvii. 414.

² Hansard's *Debates*, 3rd ser., vol. cccxxviii. 471.

³ Discontinuance of Writs Bill, H. L., 1889, no. 18; Hansard's *Debates*, 3rd ser., vol. cccxxxiii. 1394.

⁴ Hansard's *Debates*, 3rd ser., vol. cccxxxiv. 333.

CHAP. XII. immediately to become a commoner, and lose, both for himself and for his heirs, his hereditary titles¹. The Bill, however, does not appear to have advanced beyond a first reading².

¹ Peers' Disabilities Removal Bill, 1893, H. C., no. 186.

² Hansard's *Debates*, 4th ser., vol. viii. 839.

CHAPTER XIII.

THE JUDICATURE OF THE HOUSE OF LORDS IN GENERAL.

AS the various Courts of Justice separated themselves from the old *Curia Regis*, the judicial functions of the Prelates and Temporal Lords summoned to Parliament necessarily underwent a change. The jurisdiction of the Lords in cases of impeachment by the Commons and in the trials of Peers is treated elsewhere. With regard to other matters the Lords gradually lost all original jurisdiction, except in certain questions relating to the peerage, though, in the end, they retained the power of giving a final decision upon writs of error or appeals from Courts below.

CH. XIII.

Successive changes in the judicial functions of the Lords.

There were three distinct stages in this transformation—that in which the other Courts of Justice diverged from the *Curia Regis*, and Council—that in which the Council separated from the Parliament—and that which followed the separation.

It has already been shown how matters were brought from the Courts before the King in his Council in his Parliament for the purpose of having points decided which had arisen when final judgement had not yet been given, and of compelling the Justices to proceed to judgement when it had been too long delayed. When no Parliament was sitting, however, the petitions of the parties could not be presented, and it was apparently to remedy this evil that an Act was passed in the fourteenth year of the reign of Edward III. It was provided that upon the meeting of every Parliament there were to be chosen a Prelate, two Earls, and two Barons, who, with the advice of the

The Act of 14 Edward III: new Court representing the King in Council in Parliament.

CH. XIII. Chancellor, the Treasurer, the Justices of the two Benches, and others of the King's Council, were to have power, upon petition delivered to them, to direct the Justices. In cases of exceptional difficulty only they were to bring the cases into the next Parliament, for direction to be given according to the older practice¹. The new tribunal, having power to act independently of any session of Parliament, was in fact the representative of the King in his Council in his Parliament, its functions being precisely the same so far as they extended.

The Act of 25 Edward III, restricting the original judicial power of the Council.

This, indeed, was neither original jurisdiction, nor the jurisdiction of a later time by which a judgement could be affirmed or reversed upon Writ of Error or Appeal. So long, however, as the King sat in his Council in his Parliament, he and his Council sat among the Lords, and the Lords participated in the jurisdiction of the Council. The King and Council were in the habit of exercising some original jurisdiction, both in civil and in criminal proceedings, and it was a subject of complaint that the proceedings were not according to the Common Law. In the twenty-fifth year of Edward III it was enacted that in criminal cases no person should be apprehended on petition or suggestion to the Council, without due indictment or presentment, nor in civil cases without due process founded on Original Writ².

Separation of the Council from the Parliament.

These provisions were not strictly observed, but the subsequent development of the Council has little in common with the present history. The separation of the Council from the Parliament was completed in or about the seventh year of Richard II. In that year the following regulation appears upon the Rolls of Parliament:—‘As to petitions and bills the King wills that those which cannot be expedited without Parliament be expedited in Parliament, and those which can be expedited by the King's Council be laid before the Council³.’ From the tenth year of the

¹ 14 Ed. III, stat. 1. cap. 5.

² 25 Ed. III, stat. 5. cap. 4.

³ *Rot. Parl.*, 7 Ric. II, no. 51 (printed, vol. iii. p. 163).

same reign the Proceedings and Ordinances of the Privy Council have been duly recorded, and, in the main, are extant. The Parliament without the Council, however, was no longer the same body as the Parliament in which the Council sat, and the judicial as well as other functions of the House of Lords underwent a corresponding change. CH. XIII.

As the equitable jurisdiction of the Chancery was now beginning to grow, and the courts of common law had a well-recognized independent existence, there was but little jurisdiction in civil cases left to the House of Lords as a court of first instance. It could not, perhaps, be said with truth that all such jurisdiction had departed from them; and they made a spasmodic attempt to revive it in the reigns of Charles I and Charles II. There could, from the nature of things, be but few occasions on which a remedy could not be found either in the courts of law or in the courts of equity. In 1668, in the case of *Skinner v. The East India Company*, the plaintiff alleged that he could not obtain redress elsewhere, and presented a petition to the King. The matter was referred to the House of Lords, which undertook the jurisdiction, and gave judgement for Skinner. The East India Company presented a petition to the House of Commons against the proceedings of the House of Lords. A violent dispute ensued between the two Houses¹. The House of Commons took up the ground that if there was no remedy for a wrong in the ordinary Courts of Justice, it could be provided only by the whole body of Parliament. If by this they meant that an Act to create a new remedy could come into existence only in the usual parliamentary course, they were, without doubt, in the right. If, however, they meant that original jurisdiction had never resided in the Lords, and that the Lords had never had the power of sanctioning a new original writ, they were forgetting the whole history of the *Curia Regis*, of the King in Council in Parliament, and of the Courts.

Little civil jurisdiction of first instance left to the House of Lords: disputes in the seventeenth century.

¹ *Parliamentary History*, vol. iv. pp. 431-433; Hatsell's *Precedents*, vol. iii. pp. 368-392; Holles, *The Grand Question concerning the Jurisdiction of the House of Peers* (1689); 8 *Rep. Hist. MSS. Com.* 165-168.

CH. XIII. Peace was made, after a long quarrel, only on the direct interference of King Charles II. His speech to both Houses contained the following passage:—‘I remember very well that the case of Skinner was first sent by me to the Lords. I have, therefore, thought myself concerned to offer to you what I judge the best and safest way to put an end to the difference; and, indeed, I can find no other. I will myself give present order to rase all records and entries of this matter both in the Council Books and in the Exchequer, and do desire that you will do the like in both Houses, that no memory may remain of this dispute between you. And then, I hope, all future apprehensions will be secured¹.’ A resolution was thereupon carried in the House of Commons that all matters ‘relating to the business between the East India Company and Skinner’ should be erased from its Journals. A similar erasure was silently made in the Journals of the House of Lords. After this time the jurisdiction of the latter House, as a Court of first instance in civil causes, may be regarded as having been at an end.

Limitation
of criminal
jurisdic-
tion: un-
certainty
prevailing
in the
seventeenth
century.

In criminal matters the Lords, as is shown in another chapter, had vacillated with regard to their own wishes, sometimes desiring to have jurisdiction over none but Peers, sometimes to have jurisdiction in all momentous charges in which commoners were implicated with Peers. In the seventeenth century they practically asserted an original criminal jurisdiction apart from that of the trial of Peers, and from that of accusations brought before them by impeachment of the Commons. This, however, they would seem to have lost through the Act of the twenty-fifth year of Edward III, which forbade the apprehension of any one without due indictment. The Act, it is true, applied nominally to proceedings on petition to the Council, but as petition to the King in his Council in his Parliament was at this time one of the usual forms, it precluded arrest on

¹ *Journals of the House of Commons*, Feb. 22, 1669-1670 (vol. ix. p. 126).

any such petition; and criminal jurisdiction without power of arrest would obviously be nugatory. It is possible that the Act did not debar the Lords or Council from hearing cases in which an indictment had been found, but the indictment would necessarily have been found in a Court below, from which, as in the trial of Peers, it would have to be removed. CH. XIII.

It is not quite clear how far the Lords supposed their criminal jurisdiction to extend at the time of the Long Parliament of the reign of Charles I. Their proceedings have, perhaps, been a little exaggerated partly through the warmth of political feeling, and partly because questions of privilege or supposed privilege have been involved in many of the cases which appear upon the Journals. Among them are several instances of slander of Peers. If, however, these be left out of consideration, together with the impeachments duly laid before the Lords by the Commons, there are still to be found some examples of unnecessary interference by the Lords. When one Philip Bembricke counterfeited letters of protection under the hand and seal of Lord Fauconbridge, and sold them for forty shillings¹, it is possible that the Lords may have ordered the appearance before them of the accused on the ground of privilege. But, when they took upon themselves to allow the removal of an indictment not affecting any Lord of Parliament from a Court of Quarter Sessions to the Court of King's Bench², and when they ordered printers and sellers of unlicensed books to appear before their Committee, and empowered the Master and Wardens of the Company of Stationers to search for clandestine presses³, they certainly appear to have assumed very general powers. When they resumed, after the Restoration, the seats which they had lost during the period of the Commonwealth, there was still some uncertainty with regard to their judicial functions; but

¹ *Journals of the House of Lords*, Jan. 23, 1640-1641 (vol. iv. p. 141).

² *Ib.*, Feb. 15, 1640-1641 (vol. iv. p. 162).

³ *Ib.*, March 4, 1640-1641 (vol. iv. p. 173).

CH. XIII. their pretensions to act as a Court of criminal judicature concurrently with the other Courts of the King seem to have expired with their claims as a Court of first instance for civil causes, when the King's remedy of oblivion had been accepted in relation to Skinner and the East India Company.

Contro-
verted
elections of
members
of the
House of
Commons
decided by
the Lords
in the
reign of
Henry V.

In the early days of Parliament, before the Commons had learned to assert themselves, the Lords sometimes exercised a jurisdiction which the Commons afterwards regarded as their most exclusive privilege. Controverted elections were rare but when they occurred redress was obtained by petition to the King, who acted with the advice of his Council. The mode of proceeding was not always the same, but in all cases it indicated that the Commons were not and did not claim to be the arbiters¹. Soon after the Parliament had separated from the Council, a remarkable case occurred which showed clearly where they supposed the power of rectification to lie. In an election for the county of Rutland in 1417, the Sheriff returned, as one of the Knights of the Shire, one William Ondeby, instead of Thomas Thorpe, who had in fact been duly elected. The Commons then prayed the King and the Lords in Parliament that the matter might be examined. Thereupon the King commanded the Lords in full Parliament to make examination, and to act according to their discretion. The Lords called both Ondeby and Thorpe before them, and, after hearing arguments, agreed that the Sheriff's return was incorrect, that it must be amended, and that Thorpe must be returned as one of the Knights of the Shire².

Subsequent
changes.

The Lords enjoyed this jurisdiction but a short time, as the power of enquiring into false returns of Knights of the

¹ The earlier precedents from 12 Ed. II to 5 Hen. IV, are set forth in the Preface to Glanville's Reports, pp. xi-xxiii, as well as by Prynne.

² *Rot. Parl.*, 5 Hen. IV, no. 38 (printed, vol. iii. p. 530). The case has been cited both in Prynne's *Plea for the Lords and House of Peers*, and in the Preface to Glanville's Reports.

Shire was soon afterwards given by Acts of Parliament¹ to CH. XIII. the Justices of Assise. The right of petition to the King, however, on the subject of elections was not abolished, and was exercised in the reign of Henry VI². In later reigns some uncertainty seems to have prevailed until, in the first year of that of Queen Mary, we find a Committee of the House of Commons appointed to enquire whether one Alexander Newell, elected a burgess of Looe, might be of the House. It declared that he could not be a member, because, being a prebendary, he had a voice in the House of Convocation, and that the Queen's writ should be directed for another burgess³. The House of Commons also 'required,' a few years later, that, in a case of double election, 'another person' should be returned for a borough⁴. In subsequent times there were some disputes as to the power of the Chancellor to issue writs for the election of new members upon the occurrence of vacancies during a recess of Parliament, or while Parliament was sitting. They can hardly be said to belong to the history of the House of Lords in general. The Lords appear to have exercised no jurisdiction in relation to controverted elections of members of the House of Commons since the reign of Henry V.

Claims of peerage and of offices of honour have long been brought before the House of Lords, but not without express reference from the Crown⁵. It does not even appear that the Crown is bound to adopt this mode of decision, for in the case of the barony of Fitz-Walter, to which reference has already been made, the claim, though originally referred to the House of Lords, was, after a prorogation of Parliament, withdrawn from their cognizance and laid, by the King's direction, before the Privy Council⁶.

Jurisdiction in peerage cases on reference from the Crown.

¹ Stat. 11 Hen. IV, cap. 1 ; Stat. 6 Hen. VI, cap. 4 ; and see Stat. 23 Hen. VI, cap. 14.

² One of the year 2 Hen. VI has been printed in Prynne's *Brevia Parliamentaria Rediviva*, 156, et seq.

³ *Journals of the House of Commons*, Oct. 12, 13, 1553 (vol. i. p. 27).

⁴ *Ib.*, Jan. 27, 28, 1557-1558 (vol. i. p. 47).

⁵ Hale's *Jurisdiction of the Lords' House*, p. 104.

⁶ See above, p. 130.

CH. XIII. The usual course, in more recent times, has been for the claimant to present a petition to the Crown through the Secretary of State. It is referred to the Attorney-General, who makes a report upon it. The Crown then has absolute discretion to refer it to the House of Lords or not, but has commonly proceeded in that manner¹. The jurisdiction is thus not inherent in the House of Lords itself, but is only created, from time to time, as occasion may arise.

Jurisdiction in relation to representative Peers of Scotland.

There is, however, a more clearly defined jurisdiction in respect of the election of the representative Peers of Scotland, and especially in respect of votes and claims to vote. By an Act of Parliament passed in the year 1847 it was provided that when a vote or claim to vote in right of any peerage had been disallowed by the House of Lords upon trial of a contested election, the House might order that the particular title of peerage should not be called over at any future election². It was also enacted that when a protest was made at any meeting for the election of representatives, by any two of the Peers present, against any vote or claim, a copy of the proceedings must be transmitted to the Clerk of the Parliaments. The House of Lords might then, whether there was any contested election or not, enquire into the matter raised by the protest, and order the person against whose vote or claim the protest had been made to appear. Upon his failure to appear or to establish his claim, the House might make the same order as upon disallowance of a vote after trial³. In the year 1851 it was further enacted that after every meeting of the Peers of Scotland to elect representative Peers, there should be transmitted to the Clerk of the Parliaments the titles of any peerages, called at the meeting, in right of which no vote had been received and counted for fifty years. The House of Lords might then make an order to abstain from calling the title at future meetings for elections; and.

¹ For a full description of the proceedings in peerage cases, see Hubback's *Evidence of Succession*.

² Stat. 10 & 11 Vict., cap. 52. sec. 2.

³ *Ib.*, sec. 3.

the vote of any one claiming to vote in right of any such CH. XIII.
peerage could not afterwards be received¹.

By the Act of Union with Ireland in the year 1800, And in
it was expressly enacted that all questions touching the relation to
rotation or election of the Lords Spiritual or Temporal representative
of Ireland to sit in the Parliament of the United Kingdom Lords
should be decided by the House of Lords. Whenever there of Ireland.
had been an equality of votes, and consequently no complete
election, the names of the Peers of Ireland for whom an
equal number of votes had been given were to be written
on pieces of paper, and put into a glass by the Clerk of the
Parliaments, at the table of the House of Lords, during
a sitting of the House; and the Peer or Peers whose name
or names should be first drawn out by the Clerk of the
Parliaments would be deemed the Peer or Peers elected².
When, however, on the disestablishment of the Church of
Ireland on January 1, 1871, the representative Bishops lost
their right to sit in the House of Lords³, the jurisdiction of
the House in reference to the rotation of the Irish Lords
Spiritual came to an end.

The jurisdiction of the Lords in error has a sound Jurisdic-
historical foundation, though doubts have been raised, at tion of
times, as to whether the Commons do not participate in it⁴. Parliament
There are, in fact, some early cases in which the Commons in error :
appear, at first sight, to have had a voice in the reversal cases in
of judgement, as for example those of Adam de Orleton, which the
Bishop of Hereford, and Thomas Earl of Lancaster, at the Commons
beginning of the reign of Edward III. In both these seem to
instances, however, there was a want of precision in the have a
course taken, as it was not sufficiently clear whether the voice.
decision of Parliament was to be regarded as a judgement
or as a statute. In both the proceeding was commenced
by Petition. In both the form was that of a judgement and

¹ Stat. 14 & 15 Vict., cap. 87. sec. 4.

² Stat. 39 & 40 Geo. III, cap. 67. art. 4.

³ Stat. 32 & 33 Vict., cap. 42. sec. 13.

⁴ As by Sir Matthew Hale. in his *Jurisdiction of the Lords' House*,
&c.

CH. XIII. not of a statute. In both strong party feelings were at work, and it may have been thought expedient to have the assent of the Commons for political purposes in times of great disturbance. The petitions did not recognize any jurisdiction in the Commons. The Bishop of Hereford presented his to the King and Council alone. The record of the Court below was read and examined before the King and his Council, 'and also before the Prelates, Earls, Barons, and the whole Community of the Realm being in Parliament.' The judgement of reversal was given by the King and his Council with the assent of the whole Parliament¹. The idea of obtaining the consent of the Commons appears to have been an afterthought. The tribunal recognized by the parties was the King in his Council, which, as Parliament was sitting, was the King in his Council in his Parliament; but this body, as shown elsewhere, did not include the Commons.

No such cases without political significance.

It would not be easy to produce any cases which have no political significance, in which error was alleged to have occurred in the courts below, and in the determination of which the Commons have nevertheless had a voice². On the other hand, there is no difficulty in showing that the King in Council in Parliament, without any interference by the Commons, directed and corrected the ordinary proceedings of inferior Courts.

Parliament retains the jurisdiction when the Council separates from it.

When the Council finally separated from the House of Lords in the reign of Richard II, what, it may be asked, became of this jurisdiction? Did it remain with the Council, or with the House of Lords, or did it cease? According to all analogy it should have remained in existence, and have belonged to the nearest representative of the old *Curia Regis*. That, it might, perhaps, fairly be thought, was the House of Lords. It could hardly be said that the

¹ *Rot. Lit. Claus.*, 1 Ed. III, part i. m. 13.

² Or, to use the words of Sir Matthew Hale, 'where Commons are mentioned as determining the matter,' the cases are 'upon petition of parties unduly attainted, or their heirs.' *Jurisdiction of the Lords' House*, p. 127.

House of Lords was an offshoot of the Council, though it might, perhaps, be said that the Council was an offshoot of the House of Lords. If the Council had sat with the Lords, so also had the Common Law Judges, as part of the Council. The Courts over which the Common Law Judges presided were clearly offshoots of the *Curia Regis*, in which their proceedings could be corrected and directed. Still, the Council was a more important body than any that had in previous times separated itself from the ancient King's Court, and its possible claims to be a final Court of Appeal can hardly be passed over in silence.

The point seems to have been determined with sufficient precision in relation to Courts of Common Law by the unanimous opinion of all the Judges, entered upon the Rolls of Parliament, a little before the separation of the Council from the House of Lords was complete. The law was that when error occurred in the King's Bench it should be amended in Parliament¹. The essential part of 'the King in Council in Parliament,' for the purpose of this jurisdiction, was, therefore, at the time considered to be the Parliament; and as the Commons formed no necessary part of 'the King in Council in Parliament,' the word Parliament must be interpreted to mean the House of Lords.

The general principles laid down by the Judges just before the separation.

There is, moreover, good reason to believe that the whole subject had been fully considered with reference to the coming separation. For a long time before, as has been shown in the case of the Stauntons², it had been the practice to present petitions to the King in Council in Parliament, in the intermediate stages of actions in both the King's Bench and the Court of Common Pleas. The same tribunal must have had, at the same time, jurisdiction to amend a final judgement in the Court of King's Bench, for there is a precedent in the old Register of Writs, showing that error in judgement in the King's Bench was brought before 'the King in his Council in his Parliament,' which is, in another part of the same instrument, described as 'the King's Court

¹ *Rot. Parl.*, 50 Ed. III, no. 48 (printed, vol. ii. p. 330).

² See above, pp. 51-53.

CH. XIII. of Parliament¹. The Judges, at the end of the reign of Edward III, while recognizing the jurisdiction of Parliament over errors in final judgement in the King's Bench, distinctly laid down the principle that errors alleged to have occurred in the Court of Common Pleas could not be brought directly before Parliament, but must first be considered in the King's Bench². Interlocutory applications in Parliament, while cases were still *sub judice* in Courts below, appear to have ceased after the division of the Council from Parliament, and the law now took the definite shape which it retained for many centuries. Error in the Court of Common Pleas was amended in the King's Bench; error in the King's Bench was amended in Parliament, which was understood to mean the House of Lords. Their decision was final, and in that respect equal to a decision in the full *Curia Regis* of other days.

The Commons not concerned with the judgements of the Lords in the reign of Henry IV.

At the beginning of the reign of Henry IV the Commons were not only willing but anxious that they should not be supposed to have any concern with the judgements of the Lords, and made a protest to that effect. The King agreed that all judgements should be given by himself and the Lords alone, except on occasions on which, for some exceptional reason, he might desire that the Commons should participate³.

Case of the Earl of Salisbury in the reign of Henry V.

The exception left an opening for ingenious pleading in relation to assignments of error, but no advantage seems to have been taken of it except in cases of attainder. In the year 1414 Thomas, son of John Montague, Earl of Salisbury, presented a petition to the King, praying that the record and process of the declaration against his father as a traitor in the second year of the reign of Henry IV, might be viewed and examined in Parliament, and the errors re-

¹ *Registrum Brevium Originalium* (published 1531), fo. 17-17 b. *De errore corrigendo per Parliamentum*. This is not a writ of error, but a writ of *Scire facias ad audiendum errores*, which was in later times the usual process following a writ of error.

² *Rot. Parl.*, 50 Ed. III, no. 48 (printed, vol. iii. p. 330).

³ *Ib.*, 1 Hen. IV, no. 79 (printed, vol. iii. p. 427).

dressed¹. The Earl was one of those who had fallen into the hands of some of the Lancastrian party at the beginning of the reign of Henry IV, and been beheaded without trial. The Lords Temporal, with the assent of the King, had afterwards declared and adjudged that, as a traitor having levied war against the King, he should forfeit all the lands and tenements which he had in fee simple, notwithstanding the fact that he had been put to death without due process of law². CH. XIII.

The petition and the subsequent assignments of error are hardly comprehensible according to any acknowledged legal principles. It was asked that errors alleged to have occurred, not in a Court below, but in Parliament itself, should be corrected in Parliament. Among the assignments of error were two which had relation to the Commons. In one the original 'declaration and judgement' were regarded as judicial acts; in the other they were regarded as legislative acts. In the one it was complained that they had been pronounced only by the Lords Temporal with the King's assent, whereas the judgement ought to have been given by the King, as sovereign judge, and by the Lords Spiritual and Temporal, with the assent of the Commons, or on their petition. In the other it was again maintained that the declaration and judgement were bad, as having been passed without petition or assent from the Commons, because the Commons 'are of right petitioners or assenters in respect of *that which is ordained for law* in Parliament³.'

Error in
Parlia-
ment :
confusion
of ideas.

A petition of error alternating between an attempt to redress in Parliament an error supposed to have been committed judicially in the High Court of Parliament itself, and an attempt to reverse an Act or Ordinance of Attainder, is a political curiosity, but seems very like a legal absurdity. It shows only the lengths to which men might be carried by political partisanship. In any case it has no bearing upon the authority to redress error arising in Courts below.

The case
has no
bearing
on the
authority
of the
Lords over
Courts
below.

¹ *Rot. Parl.*, 2 Hen. V, no. 12 (printed, vol. iv. pp. 17-18).

² *Ib.*, 2 Hen. IV, no. 30 (printed, vol. iii. p. 459).

³ *Ib.*, 2 Hen. V, no. 12 (printed, vol. iv. pp. 18-19).

CH. XIII.

Jurisdiction of the House of Lords over error in the King's Bench from the time of Henry IV downwards.

From the time of Henry IV the jurisdiction of the High Court of Parliament (in the sense of the House of Lords), in cases of error arising in the King's Bench seems to have been fully accepted—at any rate in theory. The form of proceeding was at first by petition addressed to the King and 'the noble lords,' of which instances may be found¹. The frequent and long intermissions of Parliament, however, led to much inconvenience, and even caused the powers of the House to fall into disuse². In an Act of the year 1585 it was recited that erroneous judgements in the King's Bench could be reformed only in the High Court of Parliament (which 'is not in these days so often holden as in ancient time it hath been'), and that 'in respect of greater affairs of this realm' they could not be well determined even during the session of Parliament. All writs of error both in criminal and in civil cases had previously had the effect of bringing the judgement directly from the King's Bench into Parliament, but for the sake of expedition a new and intermediate Court of Error was now instituted. Into this Court (long known as the Exchequer Chamber) either of the parties in certain civil actions, in which the sovereign was not concerned, and which had not been commenced by original writ, could sue a writ of error³. Parliament still remained the Court of final decision, whether the causes passed through the Exchequer Chamber or not; and 'Parliament,' as we know from Sir Edward Coke, who wrote not long afterwards, was, according to the law and custom of Parliament, 'the Lords in the Upper House'⁴.

¹ E. g. in *Rot. Parl.*, 1 Hen. V, no. 19 (printed, vol. iv. p. 7).

² The following words in relation to this subject seem apposite:—
'From the third of Henry V to the accession of James I there appears to have been little exercise of judicature in Parliament civilly, or indeed criminally, unless the cruel precedents of Acts of Attainder without hearing the accused, and the indulgent precedents of Acts of Restitution, without assignment of errors, of both of which the number is great, are fit to be considered as judicial records.' Hargrave's Preface to Hale's *Jurisdiction of the Lords' House*, p. viii.

³ Stat. 27 Eliz., cap. 8. And see Stat. 31 Eliz., cap. 1.

⁴ 4 Inst. 21.

Jurisdiction in error over causes arising in the Court of Exchequer was also enjoyed from a comparatively early period by the House of Lords; but the Barons of the Exchequer were very jealous of their privileges, and the law seems to have been in some doubt as late as the time of Edward III. In the eleventh year of his reign it must have been supposed by some lawyers that error in that part of the Exchequer commonly known as the Exchequer of Pleas, at any rate, could be redressed in the King's Bench, for a writ of error in that sense was then directed to the Barons. They, however, stoutly refused to send the record of the case, as required, and they certified their reasons to the King. They gave a brief history of the Exchequer and its rights from the time of the Conquest, and stated that errors alleged to have occurred in the Exchequer had always been amended in the Exchequer itself, the Barons being directed by the King to associate with them others of his lieges, to hear the record and process¹. They were successful in their assertion that the King's Bench had no jurisdiction in error over the Exchequer. This, however, does not seem to have exempted them from the supreme jurisdiction, in early times, of the *Curia Regis*², and afterwards of the King in his Council in his Parliament. The Act of the fourteenth year of Edward III, by which power was given to a Committee of the Lords, acting with the Council, to direct the various Courts to give judgement, expressly included the Exchequer³. As the Statute only extended to the Committee (during the time when Parliament was not sitting) the power exercised by the King in his Council in his Parliament, it follows that the Council in Parliament had the same jurisdiction in relation to the

CH. XIII.
History of the jurisdiction in error of the House of Lords over the Exchequer as a Court of Law.

¹ *Remembrance Roll of the Lord Treasurer's Remembrancer, Communia de Terminis Sancti Hillarii anno xi^o Edwardi tertii.* *Adhuc Recorda.* Printed in the Introduction to *Year Books* (Rolls Series), 14 Ed. III, pp. xxi-xxv, where further information in relation to this matter will be found.

² This seems to be shown by the *Dialogus de Scaccario*, lib. i. cap. 8, where it is said 'cognitio ipsi Principi reservabitur.'

³ 14 Ed. III, stat. i. cap. 5.

CH. XIII. Exchequer as to the other Courts. When the Council was separated from the Parliament the Lords alone could thus constitute the final Court of Appeal.

It does not, however, appear that there was ever a direct appeal from the Exchequer, as a Court of law, to Parliament. Before the matter was regulated by Statute, the Barons, as has been shown, claimed that error should be considered in the Exchequer itself. In the year 1357 an Act was passed to the effect that, when complaint was made of error in the Exchequer, the Chancellor and Treasurer, associating with them the Justices and other learned persons, should call before them the Barons of the Exchequer, with the record, and correct any error, if found¹. The hearing was to be in some Council Chamber near the Exchequer, and this appears to have been the true origin of the 'Court of Exchequer Chamber,' the component parts of which differed according to circumstances. After 1585 it was constituted in one way for the purpose of considering writs of error from the Court of Exchequer, but in another way for the purpose of considering writs of error from the King's Bench.

The Court of Exchequer, as a court of law, was thus in a position very similar to that of the King's Bench. From the King's Bench some errors in judgement might be taken first into the Exchequer Chamber, and thence to the House of Lords, though others had to be taken directly to the House of Lords. From the Exchequer, as a court of law (though not as a court of equity) all errors in judgement had to be taken first to the Exchequer Chamber, but might be taken to the House of Lords by a subsequent writ of error.

The Writ of Error to bring an erroneous judgement into the House of Lords always retained the ancient form. It was a mandate from the sovereign directing the Judges of the Court below to send the record and proceedings 'to us in our Parliament . . . that we may further cause to be done thereupon, with the assent of the Lords Spiritual and Temporal² in the same Parliament, for correcting that

Importance of the form of Writs of Error to Parliament.

¹ 31 Ed. III, stat. 1. cap. 12.

² Attention has been drawn by Sir Matthew Hale in his *Jurisdiction*

error, what of right and according to the law and custom of CH. XIII.
England ought to be done.' The King in his Parliament was the Court of last appeal, and represented the ancient King in his Council in his Parliament; but the House of Lords was the tribunal that actually heard the cause.

Proceedings in error were not abolished, even in civil actions, until the year 1875¹, and no change had been made in the words of the writ. Even then there was a saving with regard to proceedings on the Crown side of the Queen's Bench, and on the Revenue side of the Exchequer²; and thus, in relation to criminal jurisdiction in error, the House of Lords has continued to be described as Parliament.

The House of Lords practically described as Parliament.

The jurisdiction of the House of Lords in appeals from the Equity side of the Court of Chancery, though it might fairly be traced to the same origin as its jurisdiction in writs of error, had nevertheless a different history. The Chancery, having always been, from the time when Parliament first existed, an office of the Parliament, was naturally very closely associated with it and with the Council. All 'original writs' for the trial of causes in the King's Courts issued out of the Chancery. Certain writs, of which the forms had been settled, issued 'as of course;' but, when any difficulty arose in relation to a new kind of writ, the authority of Parliament, that is to say, of the King in his Council in his Parliament, had to be obtained³.

Jurisdiction of the Lords in Appeals from Chancery: early relations of the Chancery with the Parliament.

The issue of original writs has usually been regarded as part of the common law jurisdiction of the Court of Chancery. It should, however, rather be considered a dis-

of the Lords' House, to an early form of writ of error in Rastell's *Entries*, in which he supposes that the words 'and Commons' were added. There is undoubtedly an addition, but, as it stands, it is meaningless, and is obviously a misprint, the words being *ac comitatum*, which could only be translated 'and the County,' 'and the County Court,' 'and the Earldom,' or 'and of the comities.' Rastell's *Entries*, 1574, fo. 284.

¹ Supreme Court of Judicature Act, 1875, Order lviii.

² *Ib.*, Order lxii; Supreme Court of Judicature Act (Ireland), 1877, sec. 65.

³ Stat. Westm. 2 (13 Ed. 1), cap. 24.

CH. XIII tinct function, more closely associated with the equitable jurisdiction than with the common law jurisdiction, so far as the latter related to the hearing of causes. As the fountain of justice under the Parliament the functions of the Chancery were of the widest possible range; as a mere Court of Common law its functions were extremely limited, and even subordinate to the Court of King's Bench. When it had given judgement, the judgement could be reversed on writ of error in the King's Bench; and a reversal actually occurred as late as the fourteenth year of Queen Elizabeth¹.

Growth of
the equity
jurisdic-
tion of the
Chancery.

The line of demarcation between the common law and equity, or between the ordinary and extraordinary jurisdiction of the Chancery, was not at first drawn in the same manner as in later times. Some of the proceedings which are usually said to have been at common law, were in fact the subject of complaint in the reign of Henry IV as being injurious to the administration of the common law itself². As late as the reign of Edward IV also the same proceedings (upon *Scire facias* to traverse an office) were referred to the equitable jurisdiction of the Court³.

Proceedings of this kind, however, were in early times not before the Chancellor alone, though in the Chancery, but before members of the Council, including the Judges, and it was sometimes expressed that the decision was given after consultation with the whole of the Council. To the King in his Council (or, when Parliament was sitting, to the King in his Council in his Parliament) may in like manner be traced the whole of the equitable jurisdiction of the Court. Certain petitions were referred to members of the Council sitting in the Chancery, until, by degrees, there grew up a practice of addressing a Petition or Bill directly to the Chancellor, and cases for which the common law was

¹ Dyer's *Reports*, 315 (no. 100), where earlier cases are cited.

² *Rot. Parl.*, 2 Hen. IV, no. 95 (vol. iii. p. 474).

³ Staunford, *Prerog. Reg.*, p. 77. See a fuller discussion of this matter in the Introduction to the *Year Books*, 12 & 13 Ed. III (Rolls Series), pp. cvi-cxi, and the article 'Common Law and Conscience in the ancient Court of Chancery,' *Law Quarterly Review*, vol. i.

supposed to provide no remedy were heard by him. As, CH. XIII.
when difficulties arose in framing a common law writ in the Chancery, the matter had to be taken into Parliament, so when a decree of the Chancellor was thought to be erroneous, a petition in Parliament might have appeared the only possible remedy.

Appeals from Chancery decrees, however, at any rate under the name of appeals, were necessarily of much later growth than writs of error from the courts of common law. The equitable jurisdiction of the Chancery was itself of slow growth, and, before it had come to maturity, men had almost forgotten the remedial power of the King in his Council in his Parliament. No petition of 'appeal' appears to have been made before the reign of James I, when the Lords heard the matters alleged in Sir John Bouchier's case, though a committee of privileges had reported that the word 'appeal' was not usual, and that in former times the petition had been addressed to the King and his Great Council¹. In the reign of Charles I, Lady Moulson's petition to the Lords for reversal of a decree in equity was referred to the Committee of Petitions². It has often been questioned by lawyers of eminence whether the jurisdiction really belonged to the House of Lords³, without any special commission from the sovereign, such as there was in the case of a writ of error to rectify judgement in a court of common law. The point is one which has reference to form rather than to substance. The Parliament, in the sense of the King, Lords, Judges, and high officers of State, was the original fountain of Justice from which flowed remedies not

Jurisdiction of the Lords in Appeals from Chancery at one time doubted.

¹ *Journals of the House of Lords*, Dec. 3, 6, 10, & 11, 1621 (vol. iii. pp. 179-180, 184, 189, 190-192).

² *Ib.*, Jan. 23, 1640-1641 (vol. iv. p. 141).

³ Spence's *Equitable Jurisdiction of the Court of Chancery*, vol. i. p. 393. His opinion seems to have been founded on Sir Matthew Hale's *Treatise on the Jurisdiction of the Lords' House*, p. 193 et seq., and Hargrave's Preface to it. The proper course, according to Sir Matthew Hale, was to present a petition to the King (upon which there should issue a commission to examine the decree and proceedings), or else to obtain an Act of Parliament.

CH. XIII. to be obtained elsewhere. It might have been technically incorrect to address a petition, in the nature of an appeal, to the Lords alone, but hardly more incorrect than to address a petition in the first instance to the Chancellor alone. The Chancellor, however, was the King's Chancellor, and the Parliament was the King's Parliament. It does not appear that the King's prerogative suffered more by a petition to the Lords in Parliament than by a petition to the Chancellor in Chancery.

But fully
admitted
since the
reign of
Charles II.

As late as the year 1675, the appellate jurisdiction of the House of Lords in equity cases was disputed by the House of Commons¹, but they did not succeed in wresting it away². The appeal, when established, was recognized as being directly from the decision of the Chancellor to the House of Lords, though decisions by his subordinates could be reheard by himself. It could, after the year 1726, at any rate, be brought upon any interlocutory matter as well as on a final decree, and, when it had been heard, the House of Lords gave direction to the Court of Chancery to rectify its own decision³. The appeal thus very closely resembled the earlier applications to the King in his Council in his Parliament during the progress of causes in the Courts of King's Bench and Common Pleas.

The Equity
side of the
Exchequer.

The equitable jurisdiction of the Court of Exchequer seems to have arisen in a manner somewhat different from that of the Court of Chancery. It has been maintained that equity had a place in the revenue side of the Exchequer as early as the reign of Edward II. It is the fact that certain proceedings of that period are mentioned as being 'of the Equity of the Court'⁴, but the mere word 'Equity' was used at a much earlier period, and is described by Bracton as mitigating the rigour of the law⁵. This, however, does not in any way show that the idea of distinct Courts for the

¹ *Journals of the House of Commons*, Nov. 19, 1675 (vol. ix. p. 381).

² Shower's *Cases in Parliament*, 81.

³ 3 Bl. Com. 55.

⁴ *Remembrance Roll* of the Lord Treasurer's Remembrancer, printed in Price's *Law of the Exchequer*, p. 260, note 1.

⁵ Bract. 12 b and 23 b.

hearing of causes in equity, as distinguished from common law, had come into existence. On the contrary we find common law Judges, as late as the reign of Edward III, hesitating with regard to their judgement when the law seems to be at variance with that which they describe as 'conscience and the law of God ¹.' CH. XIII.

The earliest known bills in Equity in the Exchequer are of the reign of Elizabeth, and there can be but little doubt that they were in imitation of the similar bills in Chancery. As the Exchequer had exclusive jurisdiction in revenue matters, the power of the Court of Chancery did not extend to them; and equitable relief could therefore be obtained only in the Exchequer itself. By a convenient fiction the jurisdiction of the Exchequer in Equity was afterwards extended, as was its jurisdiction in common law, to other subjects, and for a considerable time the Courts of Chancery and Exchequer thus had (except in certain cases which could be heard in one of them alone) a concurrent jurisdiction. During this period the only appeal from the Equity side of the Exchequer was to the House of Lords. Appeal
thence to
the House
of Lords.

The appeal from the Court of Chancery as a Court of Equity by petition to the House of Lords, being of later origin than the writ of error, was different in form, and was addressed to 'the Lords Spiritual and Temporal in Parliament assembled.' The dispute which arose in the reign of Charles II may, perhaps, have been one of the causes which determined the form of appeal, so that no jurisdiction could be claimed by the Commons. The Equity jurisdiction of the Court of Exchequer was transferred to the Court of Chancery in the year 1841 ², though the transfer was not held to apply to matters affecting the revenue. Form of
Equity
Appeal:
'To the
Lords
Spiritual
and
Temporal
in Parlia-
ment
assembled.'

The Acts of Union with Scotland and Ireland were not without effect upon the judicial functions of the House of Lords. It was expressly provided by the Act of Union Effect of
the Union
with
Scotland.

¹ *Year Books*, M., 13 Ed. III, no. 51 (Rolls Series), p. 96.

² Stat. 5 Vict., cap. 5. sec. 1.

CH. XIII. with Scotland ¹, that no causes in Scotland should be cognizable by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall. The jurisdiction of the House of Lords as a Court of Appeal was, however, not excluded, and was regulated in relation to Scotland by subsequent Acts. It was fully recognized in 1809, though it was then (with certain exceptions) limited to appeals from judgements or decrees on the whole merits of a case, as distinguished from appeals from interlocutory judgements of the Court of Session ².

And with
Ireland.

In relation to Scotland, which up to the time of the Union was a separate kingdom with different laws from those of England, even when under the same sovereign, it has not seemed necessary to trace the early stages of judicature before the House of Lords of Great Britain acquired an appellate jurisdiction over Scottish causes. In relation to Ireland, however, the House of Lords had stood in a different position for many centuries.

Kings of
England at
first Lords,
afterwards
Kings of
Ireland.

After the conquest of Ireland by Henry II, and before Henry VIII assumed the title of King of Ireland, it was styled only a dominion or lordship. John, afterwards King of England, succeeded his father as Lord of Ireland, while his elder brother, Richard, was King of England; but after the accession of John to the English throne, all the Kings of England, until the time of Henry VIII, were Lords of Ireland.

Early
relations of
the Courts
of Justice
and House
of Lords in
Ireland to
the Courts
of Justice
and House
of Lords in
England.

During this period a Parliament came into existence, and developed in Ireland, which was in many respects analogous to the Parliament of England, but was wanting in some of the powers enjoyed by the English Parliament, and in particular by the English House of Lords. Theoretically the English laws prevailed in Ireland, after they had been established by King John, and still more after the native Brehon laws had been formally abolished in the reign of Edward III. The Irish Courts of Justice were, at a very early period, in subordination to the English Courts of

¹ Art. 19.

² Stat. 48 Geo. III, cap. 151. sec. 15.

Justice, and the Irish House of Lords had not the same jurisdiction as the English House of Lords. When error was alleged in the proceedings of the Court of King's Bench in England, the matter was decided by the English Parliament or House of Lords. When error was alleged in proceedings in the Court of King's Bench in Ireland, the matter was decided by the Court of King's Bench in England¹; and if error was again alleged, the final tribunal was the English and not the Irish Parliament, the English and not the Irish House of Lords.

On the other hand, Acts of the English Parliament did not in ordinary cases extend to Ireland, and the Chief Governor or King's Deputy in Ireland held Irish Parliaments which passed laws of their own. There consequently occurred some divergence of laws, for a time, until in the tenth year of the reign of Henry VII it was enacted under Sir Edward Poynings, then Chief Governor or King's Deputy, that all Acts of Parliament previously made in England should be in force in Ireland². This law had no effect upon future Acts of Parliament which still remained inapplicable to Ireland, except where Ireland was expressly mentioned, or included in general words such as 'within any of the King's dominions.' By other Statutes, however, passed in Ireland at the same time, the power of the Irish Parliament was greatly restricted. A Parliament could not even be summoned in Ireland until the King had been certified as to the cause, and as to the articles of the proposed Acts. No Acts could be passed until the King in Council in England had approved of them. These provisions were so far relaxed in the reign of Philip and Mary, that new propositions might be certified to the King, after the summons and during the session of Parliament³. Even thus, however, the Irish Parliament had practically no

Restrictions upon the power of Irish Parliaments.

¹ This principle may be detected as early as the reign of Edward I, and was thoroughly recognized in the reign of Edward III. See *Year Books*, 13-14 Ed. III (Rolls Series), Introduction, pp. lxxii-lxxiii.

² Irish Stat. 10 Hen. VII, cap. 22. *Ib.*, cap. 4.

³ Irish Stat. 3 & 4 Philip and Mary, cap. 4.

CH. XIII. independent power of initiating any law, and the power of rejecting was of little use, as the Irish Houses of Parliament could reject only after Irish propositions had been so far modified in England as to be no longer agreeable in Ireland. The effect of this legislation, however, was to remove one cause which might have produced differences between the laws of the two countries.

The House of Lords of Ireland declared to have no jurisdiction in Error or Appeals in the reign of George I.

The assumption by Henry VIII of the title of King instead of Lord of Ireland, was of no practical importance, except in so far as, Ireland being recognized as a kingdom, its Parliament may have acquired some new dignity; but as the King of England and Ireland continued to govern in Ireland by a Viceroy, the difference was almost inappreciable. In the reign of George I, it appears that the House of Lords in Ireland had been assuming a power and jurisdiction to examine, correct, and amend the judgements and decrees of the Courts of Justice in the kingdom of Ireland. A declaratory Act was therefore passed in the Parliament of Great Britain, 'for the better securing the dependency of the Kingdom of Ireland, upon the Crown of Great Britain.' It was therein declared that the kingdom of Ireland had been, was, and of right ought to be subordinate to and dependent upon the Imperial Crown of Great Britain, as being inseparably united and annexed thereunto, and that the Parliament of Great Britain had full power and authority to make laws and statutes of sufficient force and validity, to bind the kingdom and people of Ireland. It was further declared and enacted that the House of Lords of Ireland had not, nor of right ought to have, any jurisdiction to judge of, affirm, or reverse any judgement, sentence, or decree given or made in any Court in Ireland, and that all proceedings before the Irish House of Lords upon any such judgement, sentence, or decree were null and void¹.

The appellate jurisdiction over Irish causes taken from

This Statute while expounding, did not in any way alter the relation of the Irish Courts to England, which remained as it had been for ages. At most the Statute brought into greater prominence the fact that an appeal lay from

¹ Stat. 6 Geo. I, cap. 5.

the Chancery of Ireland, not to the Irish House of Lords, but to the House of Lords of Great Britain. A very important change, however, was effected in the reign of George the Third, only seventeen years before the Union. The Act of George the First was repealed¹, but as it was in fact only declaratory, the repeal had practically little or no effect. A subsequent Act, however, was passed which placed the Irish Courts and the Irish Parliament in an entirely new position. It was enacted that 'the right claimed by the people of Ireland to be bound only by laws enacted by his Majesty and the Parliament of that kingdom in all cases whatever, and to have all actions and suits at law or in equity, which may be instituted in that kingdom, decided in his Majesty's Courts therein finally, and without appeal from thence, shall be, and it is hereby declared to be, established and ascertained for ever, and shall at no time hereafter be questioned or questionable.' No writ of error or appeal in any action instituted in any of the Irish Courts was to be received in any of the English Courts².

CH. XIII.
the House
of Lords of
Great
Britain in
1783, and
transferred
to Ireland.

The effect of this very remarkable Act was, to place the kingdom of Ireland in a position as independent as that enjoyed by the kingdom of Scotland, between the accession of James I and the Act of Union with Scotland in 1707. There was a difference in that the laws of Scotland were different from those of England, while those of Ireland were the same, but in each case the administration was independent, and subject only to the same Crown.

With the Union came another change of policy. It was, indeed, enacted that all laws in force at the time, and all Courts of civil and ecclesiastical jurisdiction within the respective kingdoms were to remain, though subject to alteration by the United Parliament. It was, however, at the same time provided that the jurisdiction over writs of error and appeals, which had been given to the Irish House of Lords seventeen years before, should be transferred to the House of Lords of the United Kingdom³. Such is the

But
restored to
the House
of Lords
of the
United
Kingdom
by the Act
of Union.

¹ Stat. 22 Geo. III, cap. 53.

² Stat. 23 Geo. III, cap. 28.

³ Stat. 39 & 40 Geo. III, cap. 67. sec. 1. art. 8.

CH. XIII. early history of the jurisdiction over Irish causes on appeal, which, as will appear below, the House of Lords still retains.

Wide range
of the
Lords'
jurisdiction
in Error
and on
Appeal.

The House of Lords has had also analogous jurisdiction elsewhere, as, for instance, in appeals from the Chancery of the Duchy of Lancaster. It has thus had authority to affirm or reverse judgement or decree in all the principal Courts of Common Law and Equity in the realm, and authority, through the King's Bench, which had a wide jurisdiction in error, over various other Courts. The many changes in legal procedure which have been brought to pass in later years, though they have had far-reaching effects on the Courts below, have still left the House of Lords, nominally at least, the Supreme Court of Appeal, the Court which gives the final decision, except in cases which are within the jurisdiction of the Judicial Committee of the Privy Council.

Threatened
loss of
jurisdiction
in 1873 :
Supreme
Court of
Judicature
Act.

In 1873, however, there was a threatened interruption in the functions of the House of Lords. By the Supreme Court of Judicature Act of that year, a Supreme Court was brought into existence, which included and united various jurisdictions previously distinct. It had two divisions. One, called the 'High Court of Justice,' comprised the former jurisdictions of the ancient Courts of Chancery, Queen's Bench, Common Pleas at Westminster, Exchequer, Admiralty, Probate and Divorce, of the London Court of Bankruptcy, of the Court of Common Pleas at Lancaster, of the Court of Pleas at Durham, and of the Courts of Assise, Oyer and Terminer, and Gaol Delivery. The other was a Court of Appeal, which could determine appeals from the High Court of Justice, and which also absorbed the appellate jurisdiction of the Lord Chancellor, of the Court of Appeal in Chancery, of the Chancellor of the Duchy of Lancaster, of the Lord Warden of the Stannaries, of the Exchequer Chamber, and, to some extent, of the Privy Council. No error or appeal was after the commencement of the Act to be brought from the High Court of Justice or the Court of Appeal, or the Court of the Chancery

of the County Palatine of Lancaster, either to the House of Lords, or to the Judicial Committee of the Privy Council ¹. CH. XIII.

The operation of the Act twice deferred.

The effect of this Act would have been to abolish the appellate jurisdiction of the House of Lords in relation to all Courts in England. It was to have come into effect on November 2, 1874². In the meantime, however, there was an opportunity for further reflection, and by the Supreme Court of Judicature (Commencement) Act, 1874, the operation of the previous Act was deferred until November 1 in the following year. In 1875 another Supreme Court of Judicature Act was passed, by which the Act of 1873 was amended in various points, and in which the operation of the section relating to the House of Lords was again postponed until November 1, 1876³. Jurisdiction was given to the House of Lords, up to that date, to hear appeals from the new Court of Appeal, not only in cases in which appeal or error might previously have been brought before the House, but also in cases in which the jurisdiction of the Privy Council had been, in 1873, transferred to the new Court of Appeal.

Before the appointed November 1, 1876, when the House of Lords was to have lost its ancient character as a Court of Appeal, another Act was passed, to take effect on the same day⁴, and practically to maintain the House of Lords in its former position. Under the Appellate Jurisdiction Act, 1876, an appeal was made to lie to the House of Lords from the Court of Appeal in England, and from any Court in Scotland or Ireland, from which error or appeal to the House of Lords previously lay by common law or statute⁵.

The jurisdiction at last saved by another Act.

It was at the same time enacted that every appeal should be brought by way of petition to the House of Lords, praying that the matter of the order or judgement, might

A new form of Appeal: a happy historical adaptation.

¹ Supreme Court of Judicature Act, 1873, secs. 3, 4, 16, 18-21.

² *Ib.*, sec. 2.

³ Supreme Court of Judicature Act, 1875, sec. 2.

⁴ Appellate Jurisdiction Act, 1876, sec. 2.

⁵ *Ib.*, sec. 3. And see Supreme Court of Judicature Act (Ireland), 1877, secs. 65, 86.

CH. XIII. be reviewed 'before Her Majesty the Queen in her Court of Parliament,' in order that the Court might 'determine what of right and according to the law and custom of this realm ought to be done¹.' This was a happy combination of the old petition of appeal with the older writ of error. The petition to the House of Lords was adopted from the petition of appeal from the High Court of Chancery to the House of Lords; the other formal words were from the writ of error in use when the House of Lords received it from the Courts of King's Bench or Exchequer Chamber.

Provisions
for sittings
during pro-
rogation
or disso-
lution.

Provisions were at the same time made to prevent delays in the administration of justice, when Parliament was not sitting. During prorogation the House of Lords could thenceforward hear appeals in the manner appointed by the House during the preceding session, and 'Lords of Appeal in Ordinary,' of whom more is said in another chapter², might also take their seats and oaths³. When a Parliament was dissolved, Her Majesty might, by writing under her sign manual, authorize the 'Lords of Appeal,' in the name of the House of Lords, to exercise the jurisdiction of the House of Lords, in relation to appeals, as if their sittings were a continuation of sittings of the House of Lords⁴.

Provisions
as to
'Lords
of Appeal.'

In Blackstone's time it was said that the law reposed 'an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that they will make themselves masters of those questions upon which they undertake to decide, since upon their decision all property must finally depend⁵.' This unquestioning faith is not so fully apparent in the Appellate Jurisdiction Act of 1876. According to its provisions no appeal can be heard and determined in the House of Lords, except in the presence of three at least of the following persons, all of whom bear the general name of Lords of Appeal:—the Lord Chancellor of Great Britain, for the time being, Peers

¹ Appellate Jurisdiction Act, 1876, sec. 4.

² See below, pp. 382-384.

³ Sec. 8.

⁴ Sec. 9.

⁵ 3 Com. 56-57.

who have previously held his office, Peers who hold or have previously held the office of Lord Chancellor of Ireland, of paid Judge of the Judicial Committee of the Privy Council, or Judge of one of Her Majesty's Superior Courts of Great Britain or Ireland, and 'the Lords of Appeal in Ordinary.'

CH. XIII.

The 'Lords of Appeal in Ordinary' were called into existence for the first time in virtue of the Act of 1876. They were required to possess the qualification of having held for two years one of the high judicial offices which gave a qualification to 'Lords of Appeal,' or of having been a practising barrister in England or Ireland, or a practising advocate in Scotland, for not less than fifteen years¹. Though, however, a new safeguard was provided for the administration of justice by qualified persons, the ancient jurisdiction of the House was, in theory at any rate, left unimpaired. The effect may, no doubt, have been to throw the judicial business more than ever into the hands of the 'Law Lords;' but, except during a dissolution of Parliament, there was nothing in the Act to exclude any members of the House of Lords from the Court of final appeal. Eleven years later this Act was somewhat modified², but the changes then introduced did not deprive the House of Lords, as a whole, of its inherent judicial power.

The descent of the ancient jurisdiction of the King in his Council in Parliament has now been traced, save with regard to one curious exception, which is a remarkable instance of the exception proving the rule. When the Council separated from the Parliament, the Parliament, or in other words, the House of Lords, retained almost the whole of the supreme jurisdiction, but not quite. There was a Council before there was, in name at any rate, a Parliament. and William of Normandy had a Council of his own before he became the Conqueror of England, or had any familiarity with judicial power in England. Jersey and the other Channel Islands were part of the Duchy of

The House of Lords not the only final Court of Appeal: jurisdiction of the Privy Council.

¹ Appellate Jurisdiction Act, 1876, sec. 6.

² Appellate Jurisdiction Act, 1887, sec. 2.

CH. XIII. Normandy, and retained their ancient judicial procedure after they became united to the English Crown. As the power of the English Parliament grew, they were not bound by its ordinary Acts, nor did any writ of error lie from the Islands to Parliament. An appeal lay, however, to the King and his Council, not apparently to the King of England as King, but to the successor of the Dukes of Normandy and his Court, or Council.

When Ireland was conquered, the English laws were imposed, and consequently the precedent of the Channel Islands did not apply to judicial proceedings. The Isle of Man, however, which retained laws of its own, had an appeal from a decree of the Lord of the island to the King in Council. Moreover when any one 'claims an island or a province in the nature of a feudal principality, by grant from the King or his ancestors, the determination of that right belongs to His Majesty in Council.' From all the dominions of the crown, excepting Great Britain and Ireland, an appellate jurisdiction (in the last resort) is vested in the same tribunal¹. Although the circumstances are not the same, the analogy of the Channel Islands would appear to have gained this jurisdiction for the Privy Council and not for the House of Lords. A similar reason may also, perhaps, be assigned for the jurisdiction of the Privy Council in relation to idiots and lunatics. Under feudal institutions, the custody of an idiot belonged to the lord of the fee, and in early times probably there was no very clear distinction drawn between a lunatic and an idiot. In the reign of Edward II, it was made a part of the King's prerogative to have the custody of the lands of born idiots, and to keep the lands of lunatics for their own use when restored to reason². The King's power, however, was still of feudal origin, and an appeal from an order of the Chancellor, in relation to idiots and lunatics, went, perhaps, naturally to the King in Council, and not to the Parliament, when the Parliament was separated from the Council. In

¹ 1 Com. 231.

² Stat. *Praerogativa Regis*, 17 Ed. II, stat. 1. caps. 9, 10.

appeals from the High Court of Admiralty, which was not a common law or equity Court, the Privy Council has also had jurisdiction, as well as in appeals from ecclesiastical Courts. Various changes have been effected from time to time, but it is needless for the purposes of this history to trace them in detail. It seems only necessary to mention that some portion of the jurisdiction (as, for example, in Admiralty and Lunacy appeals), has been indirectly transferred to the House of Lords through the 'Court of Appeal' in England, and the similar 'Court of Appeal' in Ireland¹. CH. XIII.

¹ Supreme Court of Judicature Act, 1873, sec. 18 (5); Supreme Court of Judicature Act (Ireland), 1877, sec. 86.

CHAPTER XIV.

LEGISLATIVE POWER.

The legislative power before Commons were summoned to Parliament.

THE legislative functions of the House of Lords have undergone many changes since the days of the *Curia Regis*. Before representatives of the Commons were summoned to Parliament (and they were not summoned before the time of Simon de Montfort's assembly in the forty-ninth year of Henry III), it is clear that new laws could be brought into being and that existing laws could be modified only by the sovereign and by those persons whom he called to advise him. The burgesses may have sent to the Exchequer representatives with power to make the best bargain they could with regard to the money which they were to contribute to the necessities of the State¹; and in this primitive practice may, perhaps, be discerned the germ of that which subsequently developed into the House of Commons. The burgesses, however, had not the slightest power to alter the laws of the land, and their early aspirations appear to have been limited to two principal objects,—one to escape with as light a burden as possible, the other to obtain a new charter, or a confirmation of a real or imaginary old charter for their borough.

The early Charters subsequent to the Conquest.

The idea that laws are in continual need of change was not familiar to our ancestors either immediately before or immediately after the Conquest. The King wore his crown and held his Court at stated seasons, and summoned Bishops, Abbots, and Magnates of the land to advise him in times of great emergency. On his accession he com-

¹ See below, p. 337.

monly granted a charter, or confirmed charters made by his predecessors; and he sometimes agreed to a new charter (as King John agreed to Magna Charta) under pressure of circumstances. On all these occasions he was surrounded by the ecclesiastical and lay dignitaries of the land, some of whose names appear as witnesses to the charters which were granted. The documents very rarely purported to be for the establishment of any absolutely new law. The Conqueror and his followers brought from France some laws and ideas of law which were new to the English; and some of the laws existing in England were new to the Conqueror and his followers. When a charter of laws or liberties was granted, it was usually, for some time after the Conquest, supposed to be in recognition or declaration of some laws and liberties which actually were or had been in existence. Henry I, for instance, professed to restore the laws of Edward the Confessor, with such amendments as his father the Conqueror had introduced by advice of the Barons¹. Stephen confirmed all the liberties and good laws which Henry I had granted, and all the good laws and customs in existence in the time of Edward the Confessor². Henry II in like manner confirmed all the customs which Henry I had given and granted³.

In all these cases the charter of confirmation which establishes the law is, according to its words, an act of royal grace, not necessarily made by the advice of any kind of Council. These charters were, however, made chiefly in the interest of the Church and the Barons, and were probably the result of some kind of deliberation—the embodiment of a treaty between the King upon his accession and his principal subjects. When we come to the famous Constitutions of Clarendon in 1164 we find that

The King,
Prelates,
and
Proceres
establish
the Consti-
tutions of
Clarendon
in the
reign of
Henry II.

¹ Charter printed from the *Textus Roffensis*, and the Red Book of the Exchequer, in the *Statutes of the Realm*, vol. i. p. 1, and in Blackstone's Tracts (1771), p. 286, n.

² Charter printed from Claud. D 2. fo. 75, in the *Statutes of the Realm*, vol. i. p. 4, and by Blackstone (Tracts, p. 287 n.).

³ Charter printed from Claud. D 2. fo. 79, in the *Statutes of the Realm*, vol. i. p. 4, as well as by Blackstone (Tracts, p. 288 n.).

CH. XIV. King Henry II was himself present, and that there were present also Archbishops, Bishops, Abbots, Priors, Earls, Barons, and 'Proceres' of the Realm. The establishing of the laws then made is described (even by an ecclesiastic who thought them iniquitous and hateful to God) as the acknowledgement and act of placing on record of a certain part of the customs and liberties recognized by Henry I and others¹.

The
legislative
power
in the
King and
baronage.

Such legislative power as existed then existed in the King and his baronage, under which term were included at that time the Bishops, Abbots, and Earls, as well as others holding lands of the King, in chief, as of his crown. It was indeed expressly laid down in the eleventh chapter of the Constitutions of Clarendon that Archbishops, Bishops, and all persons holding of the King *in capite* were to hold their possessions as a barony and perform suit and all customs due to the King; and the Archbishops and Bishops were to be present, like the rest of the Barons and together with them, at the judgements of the King's Court, before sentence of death or loss of member. They were thus all liable to suit of Court—suit to that Court which was afterwards known as the High Court of Parliament.

*Magna
Charta*,
and its
confirma-
tions.

Even the Great Charter of King John, which was, to all intents and purposes, a treaty between him and his rebellious Barons, purports to be made by the advice of the Archbishops of Canterbury and Dublin, the Bishops of London, Winchester, Bath and Glastonbury, Lincoln, Worcester, Coventry, and Rochester, the Earls of Pembroke, Salisbury, Warren, and Arundel, twelve other nobles who are named, and others his lieges (*fidelium*)². The confirmation of *Magna Charta* by Henry III on his accession (differing materially from the original *Magna Charta* of King John) was also by advice of Bishops, Earls, and other lieges, as

¹ Roger de Wendover (Rolls Series), i. pp. 26–30.

² John's *Magna Charta*, as printed from the MS. in the Archives of Lincoln Cathedral (collated with the Cotton MSS. and with the Red Book of the Exchequer) in the *Statutes of the Realm*, vol. i. p. 9. See also Blackstone's Tracts, p. xi.

well as of the Papal Legate¹, according to the earliest form of the confirmation itself. It appears by a document of equal authority that a Council assembled at Bristol, at which were present 'all the Prelates of England, as well Bishops and Abbots as Priors, and many Earls and Barons.' They demanded the liberties and free customs which were granted to them by the King; they thereupon with one accord did fealty, and then gladly returned home². The subsequent confirmation of the Charter by Henry III, in the ninth year of his reign, purports to be a spontaneous grant by him, but it is attested by the Archbishop of Canterbury and ten Bishops, by eighteen Abbots, by the Chief Justiciary, by ten Earls, by the Constable of Chester, and by twenty-two others who must be ranked among the Barons³. CH. XIV.

This confirmation, like the Charter of King John, partakes of the nature of a treaty, or bargain, but as Henry III was still a minor, and as a large number of the chief personages in the realm were made witnesses, it can hardly be said that the bargain was made by the King, as an absolute sovereign, without advice. Another confirmation was granted after he had attained full age in the twenty-first year of his reign. It does not purport to be spontaneous like the confirmation of the ninth year, though both are said to have been prompted by God. It is attested by the Archbishop of Canterbury, by twelve Bishops, and two Bishops elect, by eight Earls, by eighteen Barons, 'and others.'

When yet another confirmation was granted after civil war, in the forty-ninth year of the reign, there was a clause that all former ordinances and articles provided by the

The confirmation of 49 Henry III recognizes a

¹ Printed from the Charter in the Archives of Durham Cathedral, collated with the Red Book of the Exchequer at Dublin, in the *Statutes of the Realm*, vol. i. p. 14, and in Blackstone's Tracts, pp. xxvi-xxvii.

² *Rot. Lit. Claus.*, 1 Hen. III, m. 14 d, and m. 25 d (printed in Blackstone's Tracts, pp. 308-309, note q).

³ *Magna Charta*, 9 Hen. III, cap. 37. As to the consideration for this Charter and the Forest Charter, in the shape of a subsidy, see below, pp. 337-339.

CH. XIV. King and his Council, which might conduce to the honour of God and the Church, and the welfare of the realm, should be inviolably observed¹. From this it is apparent that a legislative power was recognized as having previously been in the King and 'his Council,' however that Council may have been constituted.

This confirmation made with the assent of the Commons.

This last confirmation of charters to which Henry III assented is remarkable as having been executed at a time when he was in the power of Simon de Montfort, Earl of Leicester, and in the year in which are mentioned the first known writs for summoning the Commons—Burgesses as well as Knights—to a national assembly. It commences by stating how agreement and provision had been made, by the unanimous consent and will of the King, of his eldest son Edward, and of the Prelates, Earls, Barons, and Community of the Realm, that a certain ordinance should be observed. The ordinance had previously been made with the unanimous consent of the King, the Prelates, Earls, and Barons, but not of the Commons. In the passage in which the actual confirmation occurs the Commons again appear:—'With the unanimous consent and will of our son Edward, of the Prelates, Earls, Barons, and Community of our Realm, it is by agreement provided that the ancient Charters of Common Liberties and of the Forest heretofore granted by us to the Community of our Realm . . . shall be inviolably observed for ever².'

But hardly by assent of the Commons as a distinct estate of the realm.

The difference between the provisions made in the forty-ninth year of Henry III, with the consent of the *Communitas*, and those previously made without, is very sharply marked in this document. It cannot, however, even here be said that the Commons appear as an estate of the realm. They are rather included with the Lords Spiritual and Temporal under the one word *Communitas*.

¹ *Rot. Chart.*, 49 Hen. III, m. 4, collated with Cotton. Claud. D. 2. fo. 137, and with a MS. in Corpus Christi College, Cambridge, and printed in the *Statutes of the Realm*, vol. i. p. 31, and in Blackstone's Tracts, pp. lxiix-lxxii.

² *Ib.*

The previous Charters and Confirmations are said in the same document to have been granted 'to the Community,' and they were certainly more for the benefit of the Church and the Temporal Lords than of the Commons. Having regard, however, to the writs which issued in the same year for the summons of Knights of the Shires and Burgesses, we can hardly fail to recognize a new factor in the law-making of England. The confirmation was certainly considered to be more solemn because made with the assent of the whole community, whereas previous legislation had been with the advice or assent of a Council consisting of persons who were in later times called Lords Spiritual and Temporal with a few officials.

There are, it is true, a few earlier indications that 'the people' (*populus*) were present on some great occasions, as, for instance, when the sovereign upon accession was anointed and crowned. In the absence, however, of anything like a representative system, the populace could have been but little more than the populace of the particular town or city in which the event occurred. If the King was crowned, or wore his crown, at Westminster, a Westminster or a London mob may have shouted. If he wore his crown at Winchester, or York, the shouters would have been from Winchester and its neighbourhood, or York and its neighbourhood, and could not have had the slightest pretensions to speak in the name of the Commons of England. Travelling was extremely difficult, and the difficulty had two effects. It prevented all but persons of wealth from undertaking long journeys, and it preserved local modes of thought and local prejudices in all their narrowness. A national feeling was hardly possible except among the travelled Lords of the Council, or *Curia Regis*, until the principle of representation had been gradually developed.

The 'people,' which may have been present at earlier assemblies, had no representative character.

It was long, however, before the word 'Parliament' was used exclusively in the sense in which it is now used in England, and there are some laws earlier and some later than the Confirmation of Charters of the 49th of Henry III, which have found their way into the Statute Book,

The word 'Parliament' not originally used in the modern sense :

CH. XIV. and which yet do not in any manner depend upon the desire, authority, or consent of the Commons. The Provisions of Merton¹ were made in the King's Court, in the presence of the Archbishop of Canterbury and Bishops, and the greater part of the Earls and Barons. During the reign of Henry III, indeed, it is not clear that any law, except the Confirmation of Charters, had the assent of the Commons. The Statute of Marlborough² was enacted by 'the more discerning persons of the realm, as well greater as lesser,' and the Commons may have been included among the lesser, though there is nothing to show that they were elected representatives.

The Statute of Westminster the First: the initiative with King and Council, the Magnates and Commonalty assenting.

At the beginning of the reign of Edward I the famous Statute of Westminster the First³ was enacted. Its provisions are, in the general heading, described as 'establisementz' of the King, by his Council, and with the assent of the Archbishops, Bishops, Abbots, Priors, Earls, Barons, and the Commonalty of the Realm, summoned to Westminster, though the writs for summoning the Commons are no longer extant. The initiative and the final assent were thus with the King and his Council. The word Council, however, is here used not in the sense of the whole *Curia Regis*, or Common Council of the Realm, but with the limited signification of an inner Council, which must, in this case, have consisted principally of Judges, because almost all the enactments are of a very technical and legal character.

The Statute *De Bigamis*: the King's Council and the Council of the Realm.

The provisions of the so-called Statute *De Bigamis* were first recited in the presence of some of the Bishops and others of the 'Council of the Realm,' which is here again clearly distinguished from the King's Council. The Common Council of the Realm is the old *Curia Regis*, the later House of Lords. The King's Council (without the word Common) is a Council within a Council possessing technical knowledge. This latter body, 'all of the King's

¹ Stat. 20 Hen. III., ² 52 Hen. III (Stat. Marl.), heading.

³ 3 Ed. I.

Council, as well Justices as others,' agreed that the proposed law should be reduced to writing and firmly observed¹. It was thus first introduced, verbally perhaps, to as many of the Common Council of the Realm as happened to be present, and having received their consent, was drawn up in due form by the King's inner Council with his consent. CH. XIV.

The Statutes of Gloucester² were enacted, after summons of the more discerning persons of the realm, as well greater as lesser, in the same manner as the Statute of Marlborough. The Statute of Mortmain³ had no authority but that of the King acting with the advice of his Prelates, Earls, and other lieges of the realm, who were of his Council. The Statute of Acton Burnel, or Statute of Merchants⁴ was 'ordained and established' by the King and his Council. The famous Statute of Westminster the Second⁵ was given forth by the King in his Parliament, but without any mention of the Estates of the Realm. The Statute of Winchester⁶ (for all that appears) was made on the sole authority of the King, though it must be assumed that he did not act without any of his Council. The Statute of Westminster the Third⁷ and the Statute regarding Malefactors in Parks⁸, though made 'in Parliament,' were made by the King at the instance of the Magnates or Peers, and there is nothing to show that the Commons assented. Other Acts of the reign of Edward I⁹ came into being in the King's full Parliament and by means of his Common Council; but as the use of the term Parliament was still vague, and there was a Common Council of the Realm before there were any representatives of the Commons, it is not certain that the Commons had any voice in these enactments.

Other so-called Statutes of the reign of Edward I enacted without any express mention of the Commons.

Among the many Confirmations of the Great Charter and of the Charter of the Forest one was made in the twentieth year of Edward I¹⁰, with provisions to enforce the observance of them. This was done at the request of the

The Commons never, the Lords often initiated legislation

¹ 4 Ed. I, stat. 3. ² 6 Ed. I. ³ 7 Ed. I, stat. 2. ⁴ 11 Ed. I.

⁵ 13 Ed. I, stat. 1. ⁶ 13 Ed. I, stat. 2. ⁷ 13 Ed. I, stat. 1.

⁸ 21 Ed. I, stat. 2. ⁹ 20 Ed. I, stat. 2, 3. ¹⁰ *Articuli super Chartas*, 28 Ed. I, stat. 3.

CH. XIV. Prelates, Earls, and Barons in the King's Parliament, without any mention of the Commons. The Statute of Lincoln, relating to Escheators¹, was agreed to by the King's Council in the presence of the King, who himself consented, at a Parliament. The provisions of the Statute of Champarty² were made by common accord or agreement, but it is not certain how far that expression should be understood to extend. The Statute called *De Apportis Religiosorum*³, however, was enacted by the advice of Earls, Barons, 'Magnates' 'Proceres,' and other Nobles and the Commonalty of the Realm. Apart from the grant of supplies, there is thus at first hardly a trace of legislative power in the Commons, and absolutely no trace of any initiative power of legislation. Initiation, however, did frequently proceed from the Lords, and from the King's Council.

Lords and
Commons
in the
reign of
Edward II.

In the reign of Edward II the Commons acquired a somewhat better recognized position. He renewed and confirmed certain articles of the *Articuli super chartas* not merely at the request of the Prelates, Earls, and Barons, as in the twenty-eighth year of his father's reign, but at the request of his good people⁴ of his realm, and he made further provisions also at the request of his good people. The expression 'good people' could hardly have been limited to the Prelates and lay Lords, but must have included the Commons with them. In the seventh year of his reign two enactments were made by him, and by the Archbishops, Bishops, Abbots, Priors, Earls, and Barons, and all the Commonalty of the realm assembled by his command⁵. Legislation, however, in matters chiefly affecting any particular orders in the State seems to have remained still in the hands of the King and Council in Parliament, though the petition might come from the particular order to be affected. Thus the Articles of the Clergy were set forth by the Prelates and Clergy. The King's proposed answers were recited before the King's Council in his

¹ 29 Ed. I.

² 33 Ed. I, stat. 3.

³ 35 Ed. I, stat. 1.

⁴ *Ses bones gentz*, stat. 2 Ed. II.

⁵ 7 Ed. II, stat. 1, 2.

Parliament (a body not including the Commons), and, after correction, the final answers issued by authority of the same Council¹. Even in a matter of such national importance as the regulations concerning the Sheriffs throughout the realm, the representatives of the Commons in Parliament had no assenting voice in the ninth year of the reign, though one of the reasons for the enactment was the grievous complaint of the people. The Prelates, Earls, Barons, and other Magnates² are alone mentioned as having, with the King, assented to the provisions made³. The Commons were nevertheless steadily gaining ground. The Statute of York was made with the assent of the Prelates, Earls, Barons, and the Commonalty of the Realm there assembled in the twelfth year of the reign⁴, and in the fourteenth year another law relating to Sheriffs was passed with the assent of the Prelates, Earls, Barons, and all the Commonalty of the Realm, as well as on the complaint of the Commonalty of the Realm⁵.

The first year of the reign of Edward III shows the Commons taking the initiative in matters in which during previous reigns it was taken by the so-called Lords Spiritual and Temporal or by the Council. It was at their request, and not, as in the twenty-eighth year of Edward I, at the request of the Prelates, Earls, and Barons, that the Great Charter and the Charter of the Forest were confirmed⁶.

The Lords and Council had lost the exclusive power of initiation in the reign of Edward III.

The mode of procedure was, however, very different from that by Bill in a modern Parliament, for the Commons went very humbly to work. They presented a petition to the King in his Council in his Parliament, and it was granted with the assent of the Prelates, Earls, Barons, and other Magnates. The actual power of legislating might thus seem by the turn of a phrase to be again

At first the Commons initiated only by petition.

¹ *Articuli Cleri*, Stat. Linc., 9 Ed. II, stat. 1.

² The original French word is *Grantz*—a term inapplicable to the Commons.

³ Stat. Linc., 9 Ed. II, stat. 2.

⁴ 12 Ed. II, stat. 1.

⁵ Stat. 14 Ed. II.

⁶ 1 Ed. III, stat. 2.

CH. XIV. associated with the King and the Lords alone. The assent of the Commons, as appears in a subsequent reign, was not always held to be identical with their petition. In the very next year the Statute of Northampton was made with the assent of the Prelates, Earls, Barons, and other Magnates, and all the Commonalty of the Realm summoned to Parliament. For some time afterwards it was usually recited, in the general heading to the Statutes of a Parliament, that their provisions were made at the request of the Commons with the assent of the Prelates, Earls, and Barons, or when the Commons did not take the initiative, with the assent of the Prelates, Earls, Barons, other Magnates, and the Commons.

King and Council, and King and Lords, still retained the power of making some laws without the assent of the Commons.

The exclusive power of legislation had thus in a general sense passed away from the King and the Council, and from the King and the Lords. As, however, in earlier times all legislation was in their hands, so they retained the power of making some laws without the consent of the Commons. Provisions affecting the administration of Justice were made in the twentieth year of Edward III¹, by the King with the assent of the Magnates and other learned persons of the King's Council. The important so-called Statute of Labourers, passed to meet the paucity of workers and the high demands for wages after the Black Death, had no authority but that of the King, Prelates, Nobles, and others of the Council².

Ordinance and Act of Parliament.

Another Statute of Labourers, however, of two years' later date was passed on the petition of the Commons (who represented that the provisions of the previous law had not been observed) and with the assent of the Prelates, Earls, Barons, other Magnates, and the Commons³. It is usually said that, after the legislative power of the Commons as one of the estates of the realm had been recognized, any law passed by King and Lords alone, or by King and Commons alone, was an Ordinance but not an Act. The distinction does in fact seem to be drawn in the words of these laws relating to labourers, for the first, being without

¹ Stat. 20 Ed. III.

² 23 Ed. III.

³ 25 Ed. III.

the assent of the Commons, is said to have been 'ordained,' CH. XIV. whereas the second is said to have been 'ordained and established.' The difference of form, however, is not always maintained, for the 'Statute of Money' made in the ninth year of Edward III, was 'ordained and established' without any express assent of the Commons¹. In some cases, too, the form for a Statute was '*assentu et accorde*,' and the usage seems to have wanted uniformity. In the thirty-seventh year of the reign the King agreed to certain requests or petitions from the Commons, and they were asked whether they would prefer to have them embodied in the form of an Ordinance or in the form of a Statute. They preferred an Ordinance, as being of a more temporary nature, and more readily repealed². When, however, the instrument was formally drawn up, it purported to be 'ordained' by the King at the request of the Commons, and with the assent of the Prelates, Dukes, Earls, Barons, and other Magnates assembled in Parliament³. It would seem to follow that the use of the word 'ordained' without the word 'established,' where the Commons had preferred a petition, but where their assent was not expressly stated, would, at this particular time, cause a law to be an Ordinance and not a Statute. But in the very next year a Statute⁴ which had the assent both of the Lords and of the Commons in Parliament was said only to be 'made and ordained.'

Our forefathers, however, were not very exact in their use of language for Parliamentary purposes. As the doctrines concerning legislation were in a state of transition, we need not wonder that they were not always very clearly expressed. It has sometimes been maintained that an Ordinance of Parliament did not introduce any new law, but was made only for the explanation and due execution of laws already in existence. In many instances, at any rate, this was the case. In the reign of Richard II, the

Separation of the Council from the Parliament in the reign of Richard II: end of the exclusive legislative power once belonging to the King

¹ 9 Ed. III, stat. 2.

² *Rot. Parl.*, 37 Ed. III, no. 39 (printed, vol. ii. fo. 280).

³ Stat. 37 Ed. III.

⁴ 38 Ed. III, stat. 1.

CH. XIV. Council was completely separated from the Parliament, the 'King in his Council in his Parliament' became a phrase of the past, and the proceedings of the Council were registered apart from the Rolls of Parliament. The King and Council retained the power of making proclamations to which obedience must be yielded so long as they were in agreement with the laws of the land and used to enforce due execution of those laws. The doctrine that there could be an Ordinance of Parliament, as distinguished from a statute, did not immediately fall into disuse, but the occasions on which a law came into force without the assent of the three estates, or of the Lords and Commons, naturally became more rare when the Council became completely distinct not only from Parliament as a whole, but from the baronage. From this period may be dated the extinction of that legislative power which had once belonged exclusively to the King and his Court, or to the King and his Council, but of which the Commons had acquired a share.

Question
as to the
separation
of the two
Houses of
Parlia-
ment.

Various opinions have been advanced in relation to the time at which the Lords and Commons began to sit in two separate Houses. Regarded from one point of view the question seems almost insoluble; regarded from another it is extremely simple. It is difficult to prove when a permanent physical barrier was set between the two Houses: it is easy to show that the two assemblies were always distinct. The *Curia Regis*, or King's Court, the King in his Council in his Parliament of a somewhat later time, never included the Commons. The great Officers of State and the Judges were summoned to it and sat among the Lords Spiritual and Temporal, but the representatives of the Commons, or, at any rate, the burgesses, never intermixed with them.

It could have mattered but little whether the Commons, who in the early stages of Parliament appear chiefly as petitioners, formulated their petitions at the bottom of a Hall, while the Lords were at the top, or in one chamber or building while the Lords were in another. No wall could

make the two bodies more distinct than they already were in nature. On the other hand, however, the King and the three estates were an organic whole, and there were times when they had to act collectively as the Parliament. These occasions arose at dates considerably later than any of those which have usually been assigned to the division of the two Houses. There are several instances in which a Peer newly advanced to a particular dignity takes his seat in the presence of Lords and Commons. This occurs at least as late as the reign of Henry V, when Thomas Beaufort, Earl of Dorset, was created Duke of Exeter in Parliament, and was there commanded by the King to take the seat assigned to him 'in the presence of the Lords Spiritual and Temporal, and of the Commons of the Realm assembled in this same present Parliament¹.' There is no question here of any deputation from either House to the other. The ceremony must have been in full view of all the members of both Houses who were present. The 'Rolls of Parliament,' it may be here repeated, extend to the reign of Henry VII, and there are no separate Journals of the Lords before the reign of Henry VIII.

During the reigns of Richard II and Henry IV some changes were introduced in the mode of describing the assent of the Lords to an Act of Parliament. In earlier reigns and down to the second year of that of Richard II, the assent was commonly said to be that of the Prelates, Dukes (when there were any) Earls, Barons, and other Magnates². In the third year they were described collectively as 'the Lords³,' in the fourth year as the 'Prelates and Lords⁴'—a phrase not unknown in the reign of Edward III⁵. In the ninth year the old form reappears 'the Prelates, Dukes, Marquess, Earls, and Barons⁶.' In the eleventh and twelfth years they are, as in the third, described collectively as 'the Lords⁷.' In the thirteenth

The expression 'Lords Spiritual and Temporal' does not occur before the reign of Richard II: the earlier phrases.

¹ *Rot. Parl.*, 4 Hen. V, no. 13 (printed, vol. iv. fo. 96).

² 2 Ric. II, stat. 2.

³ Stat. 3 Ric. II.

⁴ Stat. 4 Ric. II.

⁵ Stat. 34 Ed. III.

⁶ Stat. 9 Ric. II.

⁷ Stat. 11 Ric. II, and Stat. 12 Ric. II.

CH. XIV. year a new form appears, 'the Prelates and Lords Temporal'¹. The expression 'Lords Spiritual and Temporal' occurs, for the first time, in an ordinance made by the King in his 'Great Council' in the same year². It was not, however, immediately introduced into Acts of Parliament, as in the twentieth year of the reign we find 'the Prelates and Lords'³. In the twenty-first year the Prelates, Dukes, Earls, and Barons are again specified⁴, as also in the first and second years of the reign of Henry IV⁵, but in the latter year the words 'the Lords Spiritual and Temporal' are used also as being synonymous⁶.

The expression occurs in the commencing words of an Act for the first time in 4 Henry IV.

Question with regard to the 'two estates' of 'Lords Spiritual' and 'Lords Temporal': the idea probably of ecclesiastical origin.

In the fourth year of the reign of Henry IV the 'Lords Spiritual and Temporal' are for the first time mentioned in the commencing words of a Statute⁷, and although there are some exceptions, this was ever afterwards the usual form.

The question here arises whether the Lords Spiritual and the Lords Temporal are to be regarded as distinct estates before the reign of Richard II. So far as the words of most earlier Acts of Parliament are concerned, the Earls are as much distinguished from the Barons, as either from the Prelates. One form of summons was, however, sent to Earls and Barons alike, and a different form to Bishops; but, on the other hand, the form of the summons sent to the Abbots differed from both the others, and in the earliest Acts Bishops, Abbots, and Priors are specifically mentioned⁸, just as much as Earls and Barons. The point is of some importance for more reasons than one. If Bishops, Abbots, and Priors were liable to be summoned to Parliament, as holding by barony, and if their claim to be ranked as Peers was, as alleged by themselves, that they held by barony, it is difficult to see why their position merely as Lords of Parliament required a description

¹ 13 Ric. II, stat. I.

² Printed in the *Statutes of the Realm*, vol. ii. p. 74, from the Statute Roll.

³ Stat. 20 Ric. II.

⁴ Stat. 21 Ric. II.

⁵ Stat. 1 Hen. IV, and Stat. 2 Hen. IV, general heading.

⁶ Stat. 2 Hen. IV, cap. 10, 11.

⁷ Stat. 4 Hen. IV.

⁸ E. g. Stat. Westm. the First (3 Ed. I).

different from that of the lay Lords. As, however, they CH. XIV. sometimes constituted the majority of the House of Lords, we may be sure that the distinction was not made without their assent, both when they were called Prelates and when they were called Lords Spiritual. They could not, according to the canons of the Church, be present in the King's Court or Parliament when a trial reached the stage of passing a sentence affecting life or member. They would not, except when absolutely compelled, acknowledge any lay jurisdiction over themselves, and were always insisting on the privileges of their order. It is, therefore, most probable that they drew the distinction between Lords Spiritual and Lords Temporal as being in accordance with their own particular ideas. The clerical view that the Lords Spiritual constitute an estate apart from the Lords Temporal has prevailed in more modern views of the constitution, but it can hardly be said to have been recognized by the earlier lawyers.

There occurred but little of moment, so far as the history of legislative power and legislative methods affects the Lords, during the warlike reigns of Henry IV and Henry V. The Commons, indeed, complained that in Acts founded on their petitions matters were sometimes introduced which were not in accordance with the petitions themselves, and claimed to be 'as well Assenters as Petitioners.' King Henry V thereupon granted that nothing should be enacted on their petitions contrary to that which was asked, so as to bind them without their assent¹. This, however, was a matter between the King and the Commons, and not between the Commons and the Lords. The Commons had been asserting and had established the principle that they should not be bound by any legislative enactment without their own consent. Both the Commons and the Lords could now initiate legislation, and the assent of both was required to an Act of Parliament.

Down to this period it had been customary for statutes to be drawn in permanent form after agreement had been

The assent of the Commons recognized by Henry V as necessary to any law binding them.

Substitution of Bills (in the form

¹ *Rot. Parl.*, 2 Hen. V, no. 22 (printed, vol. iv. p. 22).

CH. XIV. given to their proposed substance. It appears by the heading to the statute *De Bigamis* that, in the earliest days of Parliament, the inner or King's Council, and not the whole Parliament, had given instructions for the due execution of this task. When the Council became altogether distinct from the Parliament¹, it was necessary to devise some new machinery, and commissioners were appointed² to do the work which had previously been done by the Council or its legal members. It is, however, clear that the Commons were not then satisfied with the manner in which the Acts received their final shape, and desired a change. For this reason, probably, among others, the mode of legislation began to be altered towards the end of the reign of Henry VI, when Bills in the form of Acts (as in the modern system) were introduced into Parliament as well as petitions. There was, however, practically no further change in the legislative power before the time of Charles I, except in so far as the constitution of the House of Lords was affected by the dissolution of monasteries and consequent absence of the Abbots and Priors.

The assent of the Lords Spiritual, as such, not necessary: growth of the doctrine.

In the mean time there grew up an idea that the consent of the Lords Spiritual, as distinguished from other Lords, was not in itself necessary to give validity to an Act of Parliament. It has been shown in another chapter that, at the instance of the Commons, in the reign of Richard II, a Procurator or Proxy was appointed to represent the whole of the Spiritual Lords, so that no question might arise with regard to the due enactment of statutes which had passed when they were not present. It must then have been supposed, therefore, by some persons at any rate, that an Act could not be considered duly made law unless the spiritual lords, had, in person or by proxy, consented to it. This idea, however, did not survive beyond the reign of Henry VIII, for in the seventh year of that reign it was held by all the Judges that a Parliament

¹ See above, p. 251, p. 280, and p. 322.

² *Rot. Parl.*, 11 Ric. II, no. 19 (printed, vol. iii. p. 256), and *Rot. Parl.*, 21 Ric. II, no. 74 (printed, vol. iii. p. 368).

in the modern sense might be held without any Spiritual Lords at all. The reason assigned was that doctrine which the Prelates of the reign of Richard II had enunciated, and which the greatest lawyers have always held—that the Spiritual Lords have a place in the Parliament House not in virtue of any spiritual office, but solely in virtue of their temporal possessions¹. CH. XIV.

Twenty years later the distinction between Lords Spiritual and Lords Temporal as constituting two estates appears to have been disregarded. Parliament, it was then said, 'consists of three parts, the King as the head, the Lords as the chief and principal members of the body, and the Commons as the inferior members'².

Cases have since occurred in which Acts of Parliament have been passed in the absence of the Lords Spiritual. Acts of the sixteenth year³ of the reign of Charles I, were passed by authority of the King, 'the Lords' and Commons. By one of them it was enacted that persons in holy orders should be disabled from exercising any temporal jurisdiction or authority, and that no Archbishop or Bishop should have 'any seat or place, suffrage or voice, in the Parliaments of this Realm.' The Bishops were accordingly excluded from the House of Lords. The 'Lords Spiritual' excluded from Parliament in 1640.

After this year⁵ there are no Acts of Parliament recognized by the law until the twelfth year of Charles II. In the interval the Commons voted that the House of Lords was useless and dangerous, and that whatever was enacted by the Commons had the force of law without the consent of the King or House of Lords⁶. The Commons assume the whole legislative power.

When King Charles I had been put to death, and after the Commonwealth of England had been in existence some Oliver Cromwell's 'Other

¹ Keilwey's *Reports*, 184 b.

² Dyer's *Reports*, 36 & 37 Hen. VIII, p. 60.

³ E. g. Stat. 16 Car. I, cap. 11, 14, 16, 19, &c.

⁴ *Ib.*, cap. 27.

⁵ In the Roll of Parliament there is no distinction between the Acts of the sixteenth, seventeenth, and eighteenth years of the reign.

⁶ *Journals of the House of Commons*, Jan. 4, 1648–1649 (vol. vi. p. 111).

CH. XIV. years, Oliver Cromwell conceived the idea of reverting to a House of Lords without Bishops. The Commons, not directly objecting to the institution of an upper House, desired that the nominations should be confirmed by themselves. Cromwell would not consent to this. The Commons then resolved that a form of summons should be adopted for members of 'the Other House,' and that the persons summoned should be 'the Other House of Parliament,' and should, 'without further approbation do and perform all such matters as the other House ought to do and perform, and might exercise all such privileges, powers, and authorities as the other House ought to have and exercise.'

House,
or House
of Lords,
without
Bishops.

The writs of summons to the members of the 'Other House,' about sixty in number, issued in December, 1657¹. Among those called were some who had been Peers before the Rebellion, and some men of ancient family, more than one of whom attained a peerage after the Restoration. The others were men who had rendered distinguished service to the Commonwealth or the Protector. The form of summons was not very different from that which had been in use in earlier times. Cromwell's style was 'Oliver, Lord Protector of the Commonwealth of England, Scotland, and Ireland, and the Dominions and Territories thereunto belonging.' He sent greeting to the person summoned, whose presence was commanded 'to treat, confer, and give advice with us and with the Great Men and Nobles.' He was not King, and he said nothing of fealty and allegiance; but, in other respects, he followed the ancient model as closely as possible².

Parliament met on January 20, 1657-8. On February 4, following, the Protector, in a message to the Commons, described the 'Other House' as the House of Lords. The

¹ Whitelocke, Dec. 11, 1657 (vol. iv. p. 313, in the edition of 1853).

² Whitelocke says 'the form of the writs was the same with those which were sent to summon the Peers in Parliament.' There were, however, some necessary differences, as shown above. The form of the writs has been printed in Noble's *House of Cromwell*, i. 370.

Commons who had accepted the fact, proved refractory with regard to the name; and the Protector almost immediately dissolved the Parliament. His son, and successor in the Protectorate, Richard Cromwell, summoned a Parliament, including the members of the 'Other House' to meet on January 27, 1658-9; but that also was shortly afterwards dissolved¹, and the 'Other House' was heard of no more.

Upon the restoration of Charles II the first Parliament was necessarily without Bishops, as the Act by which they had been excluded, having received the assent of King, Lords, and Commons, was recognized as valid. It was, however, brought together in an irregular manner, the Lords meeting by their own authority, and the Commons in pursuance of writs issued in the name of the Keepers of the Liberty of England. Its first proceeding, when assembled, was to declare the Parliament begun in the sixteenth year of Charles I, dissolved, and the Lords and Commons then sitting to be the two Houses of Parliament². This declaration clearly purported that the House of Lords could be effectively constituted, and that Acts of Parliament were valid, though no Lords Spiritual had a seat or a voice.

The Acts of the Convention Parliament, 12 Charles II, by consent of King, Lords, and Commons, without Bishops.

The Convention Parliament, as it has been called, sat from April 25 to December 29, 1660, when it was dissolved, in due form, by the King. It did not restore the Bishops to their ancient places, and it separated without any suggestion of a doubt as to the validity of Acts which had not the assent of the Lords Spiritual.

It did not repeal the Act of 1640, which excluded the Bishops.

A new Parliament was summoned by the King and met on May 8, 1661, without any Bishops. It passed an Act to confirm the Acts of the Parliament immediately preceding, so that no question might arise in consequence of the irregularity of the manner in which the Convention Parliament assembled³. This confirmation and, with it, the validity of all the Acts confirmed rest entirely on

The Parliament of 13 Charles II, without Bishops, confirmed the Acts of the Convention Parliament.

¹ On April 22, 1659. Whitelocke, vol. iv. p. 343.

² Stat. 12 Car. II, cap. 1.

³ 13 Car. II, stat. 1, cap. 7.

CH. XIV. the assent of the King, the Lords Temporal, and the Commons.

It afterwards repealed the Act of 1640, and the Bishops were then summoned.

In this same Parliament of 1661, however, the Act in virtue of which the Bishops had been excluded was repealed as having made 'several alterations prejudicial to the constitution and ancient Rights of Parliament, and contrary to the laws of this land,' and as having been 'by experience found otherwise inconvenient¹.' Still there is, in this repealing Act, no mention of the Lords Spiritual and the Lords Temporal, as constituting two estates of the realm, much less any declaration that they are thenceforth to be so held and esteemed, or that every Act of Parliament must have the assent of both. The effect of the repeal was at most to restore the Bishops to the position which they had held before the Act of 16 Charles I, whatever that position may have been.

Many subsequent changes in detail, but no subsequent changes in principle.

Since the time of Charles II there has been no change of principle affecting the legislative power of the House of Lords, as including Lords Spiritual and Temporal, though there have been many changes affecting the constitution of the House with regard to the number both of Lords Spiritual and of Lords Temporal entitled to sit, and with regard to the right by which they had their seats. These changes, however, can be more conveniently described in another part of this work.

The legislative power as affected by the duration of Parliaments.

The burdens or privileges of the Lords in relation to attendance in Parliament have undergone considerable changes at various times. The Peers were, as we have seen, always liable to be summoned to the King's Courts and Councils, whether called Parliaments or not, and to be summoned to Parliaments, whether including Commons or not. They have always been an essential part of Parliament in the modern sense of the term, but they have, like the Commons, had far more power in the management of the national affairs at some periods than at others.

Disregard of Acts for annual Par-

In the year 1330 it was enacted that Parliament should be held once in every year, or oftener, should there be

¹ 13 Car. II, stat. I. cap. 2.

need¹. This rule, however, was not by any means strictly followed, and in the year 1362 there was passed another Act to the same effect². Like its predecessor this also fell into disuse. In the reigns of Henry VIII, Elizabeth, and James I, there were intervals of many years during which no Parliament assembled. In the troubled reign of Charles I there was an interval of twelve years—from 1628 to 1640.

CH. XIV.
liaments
before the
Great
Rebellion.

The first Parliament of 1640 sat but a few days. The second passed an Act 'for the preventing of inconveniences happening by the long intermissions of Parliament³.' A reference was made, in the preamble, to the Act of the thirty-sixth year of Edward III by the words 'Parliament ought to be holden at least once every year for the redress of grievances.' The royal prerogative was in theory recognized by the words 'but the appointment of the time and place for the holding thereof hath always belonged, as it ought, to His Majesty and his royal progenitors;' for practical purposes, however, it was reduced to nullity by the substantive words of enactment. Whenever the existing or any future Parliament was continued by adjournment or prorogation to the tenth day of September in the third year following the last day of its sitting, it was to be *ipso facto* absolutely dissolved. The Lord Chancellor, Keeper, or Commissioners for the keeping of the Great Seal were then required to issue, within six days, writs for the summoning of a new Parliament, 'without any further warrant or direction from His Majesty.'

Act of 1640
to prevent
intermis-
sions of
Parliament
for more
than three
years.

Various provisions were made to ensure the assembling of Parliament should the Keepers of the Great Seal refuse or neglect to issue the writs of summons. Among them was one that the Peers were to assemble, and, on their own authority, send out writs to summon the Commons:

Power
given to
the Peers to
summon a
Parlia-
ment,
failing
other
means.

It is sometimes said that triennial Parliaments were established by this Act, but the effect of it was only to ensure that there should not be an interval of more than

The Act
of 1640
did not

¹ Stat. 4 Ed. III, cap. 14.

² Stat. 36 Ed. III, cap. 10.

³ Stat. 16 Car. I, cap. 1.

CH. XIV. three years between the sittings of Parliament, and that a Parliament prorogued or adjourned for three years should come to an end and be succeeded by another. No provision was made for the dissolution of a Parliament which continued its sittings without any interval of the length mentioned in the Act. The Parliament, indeed, in which the Act was made, remained in existence, so far as the House of Commons was concerned, more than twelve years, and until its sittings were interrupted, not by the automatic action of a Statute, but through the master will of Cromwell with his soldiers at his back.

establish
triennial
Parliam-
ents.

Act of 1664
for holding
Parlia-
ments once
in three
years at
least.

Four years after the Restoration this Act was formally repealed, and declared to have been 'in derogation of His Majesty's just rights and prerogative inherent to the Imperial Crown of this Realm.' It was also stated in the repealing Act that 'by the ancient laws and statutes of this realm, made in the reign of King Edward the Third, Parliaments are to be held very often.' As those statutes provided for the holding of a Parliament once every year at least, they can hardly be said to have afforded a very secure ground for the substantive enactment which followed, that Parliaments were to be held once in three years at least. The King was thenceforth to issue out his writs for calling a Parliament within three years of the termination of any previous Parliament ¹.

The dura-
tion of a
Parliament
not thereby
restricted.

This Act, like that of Charles I, did not in any way affect the length of time during which any one Parliament might sit, or require the election of new members of the House of Commons at the end of any definite period. The very Parliament in which it was passed continued in existence nearly seventeen years. All that was needed was that some kind of Parliament should be called together at intervals of not less than three years, just as some kind of Parliament was to be called together at intervals of not less than one year at the beginning of the reign of Edward III.

Effect of
long

Charles II, at the end of his reign, allowed four years to

¹ Stat. 16 Car. II, cap. 1.

elapse without summoning any Parliament. There was no power, under the Act, to compel him to issue any summons, and no machinery for summoning a Parliament without his consent. In the reign of William and Mary, also, the first Parliament (after the Convention) was continued six years and a half. So far as the Lords were concerned, the effect of the long intervals between one Parliament and another in these and preceding reigns was to lighten their burdens to no inconsiderable extent, but also to diminish their influence in the management of the realm. The time, however, was at hand when Parliaments were to be held every year though not under any legal compulsion.

CH. XIV.

intervals
between
Parliaments.

In the year 1694 another Act was passed requiring, like that of the reign of Charles II, that a Parliament should be held once in three years at the least. It contained a further provision that no Parliament should continue in existence more than three years¹. This was of greater consequence in relation to the House of Commons than in relation to the House of Lords, because it set a limit, for the first time, to the period during which representatives could sit in the House of Commons without re-election. It was, however, of very great constitutional importance, and indirectly affected even the House of Lords. As the principle was now established that there could be no 'Parliament' without representatives of the Commons, a dissolution precluded the Lords from sitting in any Parliament until the writs for the summons of a new House of Commons had been returned, and there was nothing to compel the issue of the writs until three years had elapsed after a dissolution. The Parliamentary functions of the Lords, being now dependent on the existence of a House of Commons, might thus legally be dormant for no less than three years. Practically no inconvenience followed, because there has never since been a year in which a Parliament has not met, but theoretically, at least, the power of the House of Lords was curtailed.

The Act of
1694 for
triennial
Parliaments;
how it
affected the
Lords in
theory.

In the year 1715 the continuance of Parliaments was

¹ Stat. 6 Will. and Mary, cap. 2.

CH. XIV. extended to seven years¹, but the provisions relating to the holding of a Parliament once in three years, and to the summoning of a Parliament within three years of a dissolution remained in force. The sole effect of the new Act was to give to the representatives of the Commons a longer period of representation, though subject, of course, to the Sovereign's power of dissolving. Portions of the Act of the reign of William and Mary were formally repealed in the year 1867, but only portions already rendered inoperative by the Act of George I, and portions relating to the Parliament in which the Act itself was passed².

The Act of 1715 for Septennial Parliaments.

The annual sitting of Parliament depends not on Statutes but on Supplies and their Appropriation.

Prerogative of the Crown: Dissolution of Parliament.

It would seem, therefore, that the Parliamentary functions of the House of Lords, as well as of the House of Commons, might still be legally suspended for a period of three years, because the Acts of Edward III relating to annual Parliaments, already superseded by those of Charles II and William and Mary, were formally repealed in 1863³. The security for annual sessions of Parliament lies in the power of the Commons to grant or withhold supplies, and in the necessity for a vote to appropriate them when granted.

In none of the Acts relating to Parliaments was the power of the Crown to dissolve an existing Parliament abolished or abridged. In none of them was the power of the Crown to summon a Parliament taken away. Thus as the doctrine grew up that the advisers of the Crown were responsible for the Acts of the Crown, the dissolution of Parliament, before its term had expired, became a political engine to be used, as occasion might seem to require, by the political party in power. Questions have arisen in recent times concerning the advice which ought to be given to the Sovereign by a Minister when a Government measure is rejected in the House of Lords after having passed the House of Commons. Any theory on this subject can be founded only on comparatively recent precedents—on precedents subsequent to the first formation of a Cabinet Council. The subject itself is one perilously near to current

¹ 1 George I, stat. 2. cap. 38. ² Statute Law Revision Act, 1867.

³ Statute Law Revision Act, 1863.

politics, and does not appear to be strictly relevant to a History of the House of Lords. It belongs rather to the sphere of ministerial duties and responsibilities, in common with any action to be recommended by a Minister upon the occurrence of any event domestic or foreign. CH. XIV.

It may, however, be remarked that the House of Lords does not, as is sometimes represented, possess a *veto* with regard to any measure in any sense in which a *veto* is not possessed by the House of Commons. With certain exceptions relating to money and privilege, either House can initiate a measure, and either House can amend or reject it, but neither has any constitutional power to force the acceptance of any measure upon the other. Power of either House to initiate, amend, or reject a measure.

There have, indeed, been occasions when the rejection by the House of Lords of Bills passed in the House of Commons has been the cause of popular outcry and commotion. The most memorable of these was when the Lords threw out the Reform Bill in October, 1831. The feeling of the country was shown in a manner which could not be mistaken. Another Bill was sent up shortly afterwards, and the second reading was then carried by a majority of nine. In Committee, however, the opposition was renewed; and the danger was thought to be so great that King William IV used his personal influence with individual Lords in order to persuade them to abandon their resistance. In the end he was successful, and the Bill became law. This was, no doubt, an instance in which the Lords permitted legislation contrary to their wishes, convictions, and previous votes. It was not a case in which the House of Commons, by its own strength, forced the Lords to adopt a measure, but one in which the wishes of the Sovereign and external agitation combined to overcome their antipathy¹. Action of King, Lords, and Commons in relation to the Reform Bills of 1831.

There are, however, some matters in relation to which exclusive powers are claimed, on the one hand, by the House of Lords, and, on the other hand, by the House of Commons. Thus, by the custom of Parliament, it has been said, all Bills which may affect the rights of the peerage, Custom of Parliament in relation to Bills affecting the Peerage, &c.

¹ Greville's Memoirs, ii. 303; Raikes's Journal, i. 34.

CH. XIV. are to be first introduced into the House of Lords, and to suffer no changes or amendments in the House of Commons which has, however, the power of rejecting them altogether¹. This practice, it seems, cannot be of earlier origin than that of commencing legislation in the modern form by Bill in the reign of Henry VI, and the occasions on which any questions have arisen in relation to it have been rare. It was entirely ignored by the House of Commons in the last Parliament of King Charles I, in which bills were introduced not only 'for taking away the Bishops' votes in Parliament²,' but also 'for the abolition of the House of Peers³.' This was, no doubt, an exceptional period, but later events have not all been quite in accordance with the alleged custom or privilege. Notice was given in the year 1832 of an intention to move for leave to bring a bill into the House of Commons to prevent the members of the other House of Parliament from voting by proxy. It was withdrawn, upon a suggestion that it was an interference with the privileges of the House of Lords⁴. A bill, however, to alter the mode of electing representative Peers in Scotland and Ireland, and to enable the Crown to summon Scotch and Irish Peers, who were not representatives, to sit in Parliament for life was read a first time in the House of Commons in 1869⁵.

Bills for restitution in blood, after corruption, and for restitution of honours, bills of attainder, and bills of pains and penalties have usually been first introduced into the House of Lords, but it is not clear that there is any absolute right or well-defined privilege in these matters. Courtesy and convenience may count for much in one class of bills; the long-established authority of the Lords in legal affairs may count for something in the other class. Bills of resti-

¹ 1 Comm. 168.

² Clarendon's *History of the Great Rebellion*, iii. 148; iv. 33; *Journals of the House of Commons*, March 10, 1640-1 (vol. ii. p. 101).

³ Clarendon, xi. 247; *Journals of the House of Commons*, Feb. 20, 1648-9.

⁴ Hansard's *Debates*, vol. xi. 3rd series, 1156.

⁵ *Ib.*, vol. cxciv. 3rd series, 988. See also below chapter xv. part 3.

tution, however, differ from the rest in being introduced into the House of Lords by command of the sovereign, and in being sent to the Commons as having already the Sovereign's assent¹.

The limitation of the power of the Lords when legislating on money bills is a subject with regard to which our early history is obscure. Payments of money which were independent of the ordinary feudal exactions were, perhaps, more familiar to the townsmen than to the great feudal lords. Some of the towns which had obtained charters had to send representative burgesses to Westminster, to treat with the Chief Justiciary, and render an account, before there was any House of Commons, and consequently before there was any House of Lords (under that name) as distinguished from it². As this important section of the Commons had money dealings with the Crown before they had even obtained representation in Parliament, they would naturally take care that they should not be placed in a worse position afterwards. It was obviously not for the Lords to say what the Commons should contribute. The Lords, on the other hand, being in origin the great feudal land-owners, contributed to the necessities of the Crown or the State by the very terms on which they held their lands, and found, at their own expense, the greater part of the army. This was a matter between them and the Crown with which the Commons could not interfere.

In addition to the military services which they rendered, the feudal Barons, as well as the Commons, from time to time, specially granted money, or the worth of money, to the sovereign. As, however, the burgesses made the best terms they could at the Exchequer, so also the Barons are seen, in conjunction with the Commons, to assist the King for a consideration. In 1225, forty years before that Par-

CH. XIV.
Disabilities of the Lords in relation to Money Bills: their probable origin: supplies by the burgesses before the institution of the House of Commons.

Bargains with the Crown: grants of money in return for concessions in 1225.

¹ Instances have been collected (ranging from 1848 to 1855) in May's *Law and Usage of Parliament* (10th edition), p. 435.

² See, e. g. King John's Charters to Gloucester and Ipswich, (printed in *Rotuli Chartarum*, pp. 57, 65). See also *Dial. de Scacc.* ii. 13.

CH. XIV. liament or assembly which Simon de Montfort caused to be summoned, the Archbishops, Bishops, Abbots, Priors, Earls, Barons, Knights, freeholders, and all the King's subjects¹, gave a fifteenth part of all their moveables in return for a confirmation of the Great Charter and for the Charter of the Forest².

It is not by any means apparent how this grant was obtained from 'all.' The King, according to a contemporary, held his Court, at Christmas, at Westminster. The 'clergy and people' were present with the Magnates. Hubert de Burgh, the Justiciary, spoke, and represented the evil plight of public affairs and the necessity of help from all. He suggested the gift of a fifteenth both from the clergy and from the laity. Upon this 'the Archbishop, and the whole assembly of Bishops, Earls, Barons, Abbots, and Priors, after deliberating,' answered that they would gladly agree to the King's request if he would grant them the liberties which they sought. The King agreed to 'that which the Magnates asked,' and the charters were forthwith written out and sealed³. It is clear, both from the attestation of the charters and from the words of the chronicler, that the final bargain was effected between the King, on the one hand, and the nobles and church dignitaries on the other. It is possible that some members of the clerical body (whom the chronicler describes as the clergy) and some knights responding to a general summons, according to the terms of John's Great Charter, may have been at hand, if not in the same chamber with the Magnates. They may have signified to the Earls, Barons, and clerical dignitaries their willingness to accept the proposed bargain, and the latter may then, 'after deliberation,' have assented to it. But there is no evidence of any such transaction, or of the authority of any part of 'the people,' to consent to a tax upon the rest, except, perhaps, in the case of burgesses representing their town in accordance with its charter.

¹ *Omnes de regno nostro.*

² *Magna Charta*, 9 Hen. III, cap. 37.

³ Roger de Wendover, *Flores Historiarum* (Rolls Series), vol. ii. p. 282.

All that can be said is that in some way a bargain was struck between the King and the Bishops, Earls, Barons, Abbots, and Priors, which had the effect of binding all classes. It would almost seem that those who gained the benefits for all were regarded as having power to agree to the price which all would have to pay. CH. XIV.

This precedent for striking a bargain was followed in later times, after the establishment of the House of Commons, upon occasions of great emergency, but the Commons were then parties to the grant in Parliament. Thus, when in the fourteenth year of his reign Edward III was brought to great straits by his wars with the Scots and the French, he obtained an extraordinary grant of ninth in one act¹, but he had already made some extraordinary concessions in others². The concessions, in fact, preceded the grant; and it was recited in the act in which the ninth was given to the King that they were given in consideration of these preceding acts. The King released and pardoned arrears of various kinds due to him, and consented to abolish the 'Presentment of Englishry' which had been the badge of the subjection of the conquered English to their French conquerors. The grant was made by the Prelates, Earls, Barons, and Commons.

The principle of the bargain still accepted after the House of Commons was established.

Other similar instances are found upon the rolls. On ordinary occasions, however, the grants appear to have been made, during a long period, without Act of Parliament. The clergy, notwithstanding the *Praemunientes* clause in the writs of summons to the Bishops, ceased to attend in Parliament after the fourteenth century, and taxed themselves independently in Convocation. The Commons taxed themselves in Parliament, but independently of the Temporal Lords. A little later the Commons and Temporal Lords seem to have joined in grants to be levied in the same proportion. In the reign of Richard II they are described as grants made by the Commons with the assent of the Lords. In these cases, perhaps, the Commons made,

Ordinary grants of supplies in early times : Convocation.

¹ 14 Ed. III, stat. 1. cap. 20.

² *Ib.*, cap. 2, &c.

CH. XIV. as it were, a proffer, and the Lords agreed to give of their moveables, at the same rate, and in addition to the military services which they owed. The Commons (now including both knights of the shires and burgesses) made the bargain, so to speak, as some representative burgesses had made it in the days before Parliaments, and the Lords became parties to the transaction.

Constitutional struggle in the reign of Henry IV.

It cannot, however, be said that the doctrine of supply had, as yet, been laid down with mathematical precision. But, during the reign of Henry IV, a general principle was established and reduced to writing after a short constitutional struggle. The Commons, in the second year, prayed that, before granting supplies, they might receive answers to their petitions. The King, after consultation with the Lords, replied that it had not been usual for the Commons to have their petitions answered before granting subsidies, and that he would not change the good customs of ancient times¹.

In the ninth year, when Parliament was assembled at Gloucester, the King sat with the Lords Spiritual and Temporal in the Council Chamber of the Abbey. A question was put to the Lords as to what aid would suffice and be necessary in view of the dangers which threatened the realm. They answered that, when the King's necessities, on the one hand, and the poverty of his people, on the other, were considered, no less aid would suffice than 'a tenth and a half' from the cities and boroughs, and 'a fifteenth and a half' from other lay people. Thereupon a message was sent by the King's command to the Commons desiring them to send before the King and Lords some of their number to hear and report to the rest as the King should command. They accordingly sent twelve members into the presence of the King and Lords. It was the King's pleasure, they were then informed, that the question which had been put before the Lords and the answer given (both of which were communicated to them) should be reported to their fellows, in order that their whole body might take

¹ *Rot. Parl.*, 2 Hen. IV, no. 23 (vol. iii. p. 458).

steps to conform, as nearly as possible, to the proposal of CH. XIV. the Lords.

When the report was made to the Lower House its members were greatly agitated. They declared that the proceeding was highly prejudicial and derogatory to their liberties. At last the dispute was brought to an 'indemnity,' of which a memorial was, by the King's command, entered of record upon the Roll of Parliament. The purport of this instrument was that the King had no desire that anything should be done which could in any way turn against the estate represented by the members of the Lower House in Parliament, or against the liberties of the Lords. He therefore willed, granted, and declared, with the advice and consent of the Lords, that it should be lawful for the Lords to consult among themselves in Parliament, in the King's absence, with regard to the state of the realm and to the remedies which might be required, and that it should, in like manner, be lawful for the Commons to consult among themselves on the same subjects. It was nevertheless provided that neither the Lords nor the Commons should make any report to the King with respect to any supplies which had been granted by the Commons and to which the Lords had agreed, nor with respect to any communications having reference to supplies, until the Lords and Commons had come to an accord in the matter, and then only in the manner and form accustomed, which were defined to be by the mouth of the Speaker of the House of Commons. It was also the King's pleasure, with the assent of the Lords, that the communication made in the Parliament of Gloucester should never be drawn into a precedent or turn to the prejudice or derogation of the liberties of the estate which the members of the Lower House represented¹.

The principles then accepted with regard to supplies.

We thus find three points accepted in relation to the constitutional method of voting supplies. They were to be granted by the Commons, to have the assent of the Lords, and to be

¹ *Rot. Parl.*, 9 Hen. IV, no. 21 (printed, vol. iii. p. 611).

CH. XIV. reported to the King by the Speaker of the House of Commons. There was nothing to prevent any suggestions from the Lords to the Commons; but they were not to have any appearance of dictation caused by the use of the King's name, and they were not to be preceded by any report to him.

Grants of
supply by
Acts of
Parlia-
ment.

The mode of granting supplies, however, had, even yet, but little analogy with that of later days. There were long intervals between Parliament and Parliament, and grants were made sometimes for long periods of time, sometimes for the life of the sovereign. It was only by degrees that the grants took the form of Acts of Parliament. In the reign of Henry VIII some occur in this form, and the subsidies voted in Convocation were then confirmed by Statute¹. The practice of taxing the clergy in Convocation was not discontinued until the year 1664, after which time they were taxed in the same manner as the laity.

Financial
effect of
the abo-
lition of
feudal
tenures.

The Great Rebellion, and the abolition of feudal tenures immediately after the Restoration, effected, in theory, at any rate, a complete revolution in the relation of the great land-holders to the State. Their obligation to provide a national army had ceased, and they constituted but a comparatively small portion of the whole population. Everything that was necessary for the public service had now to be raised by taxation in some form; and the members of the House of Commons represented almost the whole of the persons who were to be taxed. When, therefore, they claimed exclusive privileges in regard to Money Bills, they had not only some historical grounds for their pretensions, but also a powerful argument in the interests with which they were charged.

Dispute
between
the two
Houses in
1661.

In 1661 the Commons objected to a Bill sent down to them from the Lords, and having for its object the paving of the streets of Westminster. They said that 'it went to lay a charge upon the people,' and that 'it was a privilege

¹ See Stat. 32 Hen. VIII, cap. 23; 37 Hen. VIII, cap. 24 and cap. 25. The last confirmation was in 1663 (Stat. 15 Car. II, cap. 10).

inherent in their House that Bills of that nature should first be considered there.' They then sent up a Bill of their own, but the Lords amended it by the insertion of a clause, which the Commons would not accept because, as they said, the amendment infringed their privileges. The Lords did not admit that they had no power in such a matter as this, and produced some precedents which they considered to be in their favour¹. As neither side would give way, no legislation could be effected. CH. XIV.

In 1671 the Commons resolved, with reference to an amendment introduced into a Money Bill by the Lords, 'that in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords².' In 1678 they resolved, 'that all aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; and all Bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint, in such Bills, the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords³.' This resolution did not, in its terms, affect the power of the Lords to reject a Money Bill, though it denied them the power of initiating or altering it. The Lords could not be taxed without their own consent, but they could not direct the course of taxation. Resolutions of the Commons, in 1671 and 1678, in relation to the Lords and Money Bills.

The proceedings of later times were long regulated, in the main, by this most important resolution of the year 1678. There have been instances in which the privileges claimed by the Commons, in this respect have not been pressed to their full extent, and in which expedients have been devised for adopting reasonable suggestions made by The restriction on the Lords has since been practically acknowledged.

¹ *Journals of the House of Commons*, July 29, 1661 (vol. viii. p. 315), and *Journals of the House of Lords*, July 30, 1661 (vol. xi. p. 328). There was a precedent in the fifth and another in the thirty-first year of Elizabeth.

² *Journals of the House of Commons*, April 14, 1671 (vol. ix. p. 236).

³ *Ib.*, July 3, 1678 (vol. ix. p. 509).

CH. XIV. the Lords¹, but the general principle in relation to measures of importance has never been abandoned. It may, indeed, be said that the power of the Lords even to reject a Money Bill has been threatened, partly by direct resolutions of the House of Commons, and partly by the indirect method of including particular money clauses in Bills of more general application.

New Resolutions of the House of Commons in 1860.

In the year 1860 the Commons sent up to the Lords a bill for the repeal of acts imposing duties upon paper. The Lords rejected it, and their action of course had the effect of continuing the duties in accordance with the existing law. The Commons re-asserted their rights in a series of resolutions. One was, 'that the right of granting aids and supplies to the Crown is in the Commons alone.' In another, though it was admitted that the Lords had on previous occasions rejected Money Bills, it was declared that the exercise of the power of rejection was 'justly regarded' by the House of Commons 'with peculiar jealousy, as affecting the right of the Commons to grant the supplies, and to provide the ways and means for the service of the year.' A third was to the effect 'that to guard, for the future, against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over taxation and supply,' the House of Commons 'has in its own hands the power so to impose and remit taxes, and to frame Bills of Supply, that the right of the Commons as to the matter, manner, measure, and time, may be maintained inviolate².'

Present position of the power of the Lords to reject a Money Bill.

The meaning of the last resolution was soon made plain. The repeal of the paper duties was included in the general Customs and Inland Revenue Bill of the year 1861. The Lords were (according to the doctrines of the Commons) powerless to amend it by striking out a particular clause, and they could not reject it without deranging the whole.

¹ The details relating to these matters are hardly within the range of the present Work. They may be found in Sir T. Erskine May's *Law and Usage of Parliament* (10th edition), pp. 54c-550.

² Hansard's *Debates*, 3rd series, vol. clix. 1383-1606, July 5, 6, 1860.

financial scheme for the year. This was of course practically impossible, and they had no alternative but to pass the entire measure, and so reverse their decision of the previous year¹. It would seem that, should the Commons always follow the same policy, the Lords would lose even the power of throwing out a Money Bill, or would be able to assert it only at the risk of interrupting all legislation affecting the public revenue and expenditure².

¹ When passed, the Act became the 24 Vict. cap. 20, by the fourth section of which the paper duties were repealed. See also Hansard's *Debates*, 3rd series, vol. clxii. 594, and vol. clxiii. 68.

² An Address of the Lords to the King, in 1677, in relation to amendments, might seem to describe very appositely the more recent position of the House in relation to the rejection of Money Bills. The Lords had then made some amendments in a Supply Bill for building ships of war. The Commons 'disallowed' them. The Lords gave their reasons, but the Commons remained 'unmoveable.' The Lords then said:—The Commons 'have put upon us the extreme difficulty either of shaking our privileges by withdrawing our amendments, or of hazarding the safety of the nation by letting a bill fall that is necessary to this time.' They yielded against their judgement, 'and out of tenderness that the Whole may not suffer by our insisting on *that which is our undoubted right*.' *Journals of the House of Lords*, April 16, 1677 (vol. xiii. p. 119).

CHAPTER XV.

CHANGES IN THE COMPONENT PARTS OF THE HOUSE OF LORDS.

PART I.

THE FEUDAL PERIOD: DISAPPEARANCE OF THE ABBOTS: POSITION OF THE CHANCELLOR: ABOLITION OF FEUDAL TENURES: COMMENCEMENT OF A NEW SYSTEM: PEERAGES AS REWARDS FOR POLITICAL SERVICE.

CHAP. XV. **S**OME changes in the component parts of the House of Lords have been incidentally noticed in preceding chapters, but it has been thought that the subject, as a whole, could most conveniently be deferred to the last.

Composition of the assembly of 1265.

In the earliest Parliaments there were Bishops, Abbots, and Priors of various religious Houses, the Master of the Knights of the Temple, the Prior of the Hospital of St. John of Jerusalem in England (or of the Knights Hospitallers), as well as Earls and Barons. The numbers of the Abbots, Priors, and Barons, were, however, subject to great fluctuations, and the numbers of the Earls were not uniform throughout. Thus in 1265 there were but five Earls and eighteen Barons summoned, the Archbishop of York, thirteen Bishops, sixty-five Abbots, and thirty-five Priors, including the Prior of the Hospital of St. John of Jerusalem in England, and the Prior of the Order of Sempringham, whose position was somewhat different from that of the others¹. There were also separately summoned five Deans, who would, in later times, have had to attend either by virtue of the *Praemunientes* clause in the writs to the Bishops of their respective dioceses, or as members of the Council.

¹ *Rot. Lit. Claus.*, 49 Hen. III, m. 12 d.

When Edward I summoned a Parliament to meet on November 13, 1295, he called nine Earls, and forty-one Barons, two Archbishops, eighteen Bishops, sixty-seven Abbots, the Prior of the Hospital of St. John of Jerusalem, the Master of the Order of Sempringham, and the Master of the Knights of the Temple¹.

CHAP. XV.

And of the Parliament of 1295.

The varying numbers of the Temporal Lords (and especially of Barons) summoned in subsequent years have already been noticed². All the Bishops usually received writs. When their sees were vacant, the Guardians of the Spiritualities were summoned in their stead. There is thus much more uniformity in their writs of summons than in those to the Earls who were sometimes engaged in foreign service, and who were sometimes under age. An earldom, too, sometimes became extinct by the death of its holder, a bishopric never; and the creation of a new earldom was a more common event than the creation of a new see.

Uniformity in the writs of summons to Bishops.

The number of Priors and Abbots summoned, however, varied quite as much as that of the Barons, and, to some extent, for the same reasons. They were liable to summons by reason of holding by barony, but they were not summoned unless the King desired their presence. When, in the reign of Edward III, precedent and custom had largely taken the place of the King's pleasure, with regard to the persons who should be summoned, there was drawn up a list of Abbots and Priors whom it had not been usual to call. They were no less than twenty-eight in number³. The catalogue was not by any means accurate, as it included the Master and Prior of the Order of Sempringham, as well as the Abbots of Fountains and Furness, whose names might easily have been found among the earlier writs of

But not to Priors and Abbots before the reign of Edward III.

¹ *Rot. Lit. Claus.*, 23 Ed. I, m. 3 d and m. 4 d. It may here be mentioned that, on the dissolution of the Order of the Knights of the Temple, their possessions in England were given to the Prior and Brethren of the Order of the Knights of St. John of Jerusalem in 1324 (17 Ed. II, stat. 3). The latter Order survived in England until the reign of Henry VIII, as shown in another chapter.

² See above, p. 96.

³ *Rot. Lit. Claus.*, 6 Ed. III, m. 36 d.

CHAP. XV. summons, and even among the writs of the same reign. The mere fact that it was made, however, is an indication that the composition of the House of Lords was falling into a groove, the Temporal Lords and the Spiritual Lords alike having to be called in accordance with a recognized usage. Soon after this time, and before the middle of the reign, there was a permanent diminution in the number of Abbots and Priors summoned.

The dignities held by the Temporal Lords at various times.

In addition to Earls and Barons, the Lords Temporal have, at various times, included, if not Kings, at least one whom the English recognized as King, and Princes, Dukes, Marquesses¹, and Viscounts¹. John of Gaunt, Duke of Lancaster, who assumed the style and title of King of Castile and Leon, was summoned, in the first and in subsequent years of the reign of Richard II, as King of Castile and Leon, and as Duke of Lancaster². Edward, son of Edward I, was summoned to Parliament as Prince of Wales, and Earl of Chester, in 1302³. The first Duke summoned was Edward, the Black Prince, son of Edward III, who was also Prince of Wales, and was summoned as Prince, as Duke of Cornwall, and as Earl of Chester⁴. The first Marquess summoned was Robert de Vere, Marquess of Dublin, in 1386⁵. The first Viscount summoned was John, Viscount Beaumont, in 1441⁶.

Majorities of Spiritual Lords through extinction of peerages.

As new dignities were but sparingly created between the time of Edward III and that of Henry VII, as old families died out, in the course of nature, or came to an

¹ Both Marquess and Viscount were titles introduced from abroad, and inconsistent with all practice and tradition in England. A Marquess should, according to etymology and precedent, have been no more than an Earl having jurisdiction on a March or Frontier. A Viscount, according to all precedent, was only an Earl's Deputy, or Sheriff. There had been Earls of March, or of the Marches towards Wales, before there was any Marquess in England; and the Sheriffs of England had been known, in the French which was spoken in England, as Viscounts or *Vicountes*, in Latin as *Vicecomites*, since the Conquest.

² *Rot. Lit. Claus.*, 1 Ric. II, m. 37 d, *et alibi*.

³ *Ib.*, 30 Ed. I, m. 13 d.

⁴ *Ib.*, 24 Ed. III, pt. 2, m. 3 d, *et alibi*.

⁵ *Ib.*, 10 Ric. II, m. 42 d.

⁶ *Ib.*, 20 Hen. VI, m. 27 d.

untimely end in the civil and foreign wars of the period, or through attainders of High Treason, the number of Temporal Lords had a diminishing tendency. Although, as we have seen, fifty was about their normal number in the middle of the reign of Edward III, there were but twenty-nine summoned to the first Parliament of Henry VII. The number of Abbots and Priors who had seats was about the same; and the Spiritual Lords were thus in a majority equivalent to the whole Bench of Bishops. This majority was destined to be soon diminished, and not very long afterwards annihilated. In the reign of Henry VII there were about five¹ creations of new Peers, apart from promotions in the peerage, and from restorations of honours and confirmations of previous grants. In the first thirty years of the reign of Henry VIII there were, perhaps, twenty new creations apart from promotions, restorations, and confirmations. These had some effect upon the relative proportions of Lords Temporal and Lords Spiritual, but they were followed by an event of far greater moment.

The most important of all permanent changes ever effected at any one time in the constituent parts of the House of Lords was that which befel when the greater monasteries were dissolved. It would be beyond the province of this history to trace in detail all the events which rendered such a revolution possible, when the Spiritual Lords having seats in Parliament were commonly equal, if not superior in number, to the Temporal Lords. It may suffice to remark that the doctrines of the Lollards, which afterwards developed into those of the Puritans, had sensibly affected the whole nation, that the power of the Crown had greatly increased since the Wars of the Roses,

The dissolution of the greater monasteries.

¹ It is not, as might be supposed, a very simple task to count the number. There were altogether no less than thirty-nine creations, promotions, confirmations, and restitutions in the peerage of England. *List* compiled by Mr. R. D. Trimmer, and published in the 47th Report of the Deputy-Keeper of the Records, pp. 79-83. These, however, cannot of course be all considered to make an absolute increase in the number of Peers.

CHAP. XV. from the security given to the throne when Henry VII ascended it, that the enquiries touching the minor monasteries and their results had created a strong prejudice against monasteries in general, and finally that King Henry VIII and his courtiers looked with longing eyes to the spoil within their reach.

The Act relating to those which were surrendered.

Most of the Abbots and Priors made a voluntary surrender of their possessions, and this, we may be sure, they would not have done, had they seen the least hope of gaining anything by resistance. High treason and heresy were so near akin in those days of burning theological hatred, and heresy was so nearly identical with difference from the King's religious opinions, that an Abbot who attempted to retain his abbey and his spiritual dignity would almost certainly have paid the penalty with his life. The Acts relating to the dissolution were very skilfully worded. The possessions of those Houses which had been voluntarily dissolved were given to the King, and were to be within the survey of the Court of Augmentations of the Revenues of the Crown¹. Those which came to the King's hands by attainder of Treason were excepted². It was, however, provided in the same Act that all monasteries and their possessions which should in any other way than by surrender come to the King should also vest in the King³. As soon as an Abbot or Prior was attainted of Treason the Abbey or Priory became vacant, and the possessions of his House would (if of royal foundation, as would probably be assumed) be taken in the ordinary course into the King's hand, there to remain until a successor should be appointed, and livery should be granted. When therefore, the act of taking possession upon vacancy vested the possessions in the King by Act of Parliament, all difficulties with regard to the corporate character of an Abbot or Prior, or his House, were at an end.

The Act relating to those

By a subsequent Act which placed the franchises and jurisdictions attached to the possessions of the surrendered

¹ Stat. 31 Hen. VIII, cap. 13, secs. 1-4.

² Sec. 4.

³ Sec. 3.

Abbeys under the survey of the Court of Augmentations¹, the similar franchises and jurisdictions attached to the possessions of Abbeys which had come into the King's hands through attainder, were placed under the survey of the Surveyors-General². Thus a separate machinery was provided for the possessions of abbeys coming to the King's hands through attainder, and not through voluntary surrender. The result, however, after the legal difficulty had been evaded, was the same in both cases. The monasteries were dissolved, the Abbots and Priors ceased to sit in Parliament, and the King had the lands at his disposal.

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which came to the King's hands by attainder.

The effect was practically to destroy for ever the power of one of the so-called Estates of the Realm. The Lords Spiritual, reduced now only to Archbishops and Bishops, could never again command alone a majority in the House of Lords. They might still turn the scale, as in fact they did, on important divisions in later times. They might sometimes be of use, as a contingent to a political party of the day, but could not dictate terms as an independent body. The few new bishoprics created by Henry out of the spoil of the monasteries still left the Lords Spiritual in such a minority that the Lords Temporal outnumbered them in the proportion of about two to one, and their relative number grew less in later generations.

Practical destruction of the power of one of the so-called Estates of the Realm.

At the time of this revolution (for it was little less) an Act was passed 'for placing of the Lords' in their House, which, while omitting of course all mention of Abbots, described the seats of the Bishops and of the Lords Temporal. The most important personage at the moment was the King's Vice-gerent for Ecclesiastical Jurisdiction (Thomas Lord Cromwell), who was to sit above the Archbishop of Canterbury. Certain other great Officers of State had different places assigned to them according to their rank, each sitting in one place if below the rank of a Baron, and in another if a Baron or in a higher grade of the peerage. If Peers they were to sit above all Dukes

The Act 'for placing of the Lords': the Chancellor.

¹ Stat. 32 Hen. VIII, cap. 20. sec. 1.

² Sec. 2.

CHAP. XV. except those of the blood royal, if not Peers they were to sit 'at the uppermost part of the [wool] sacks in the midst of the Parliament Chamber.' These officers were the Lord Chancellor, the Lord Treasurer, the Lord President of the King's Council, the Lord Privy Seal, and the Chief Secretary. Except the Lord Chancellor, there is no mention made of the Judges, who had formerly sat as part of the King's Council in his Parliament, though they were still summoned. The Great Chamberlain, the Constable, the Marshal, the Lord Admiral, the Great Master or Lord Steward, and the King's Chamberlain, were to be placed after the Lord Privy Seal, but above all other personages of the same degree as themselves¹.

The Act has, in modern times, lost much of its force, as it is long since there has been a Lord High Treasurer, or even a Lord High Admiral; and Secretaries of State not unfrequently sit in the House of Commons. One of the officers mentioned, however, is so inseparably associated with the House of Lords that it may be convenient, in this place, to give in outline the story of his connexion with the Parliament.

The early Chancellors were ecclesiastics; they received a summons only when Bishops.

In early times the Chancellor would seem to have been commonly in close personal attendance on the King. When a law was made, as it often was before the existence of a true Parliament, by charter, the Chancellor was usually present to seal it with the Great Seal, of which he had charge. His presence in the King's Court or Council appears to have been a matter of course. For many generations after the Conquest the Chancellor was always an ecclesiastic, and most frequently a Bishop. When the writs of summons to Parliament commence, we find that the Bishop-Chancellor is summoned not as Chancellor but as Bishop. The distinction may at first sight appear immaterial, but is in fact of some importance. It was only as Bishop that his summons could contain the *Praemunientes* clause to warn the clergy of his diocese, and it was therefore necessary that he should be summoned in his episcopal

¹ Stat. 31 Hen. VIII, cap. 10.

capacity. When not a Bishop the Chancellor does not seem to have been summoned at all. CHAP. XV.

The inference to be drawn, however, is not that the Chancellor was not expected to attend among the Lords, but that his attendance was necessary in virtue of his office, and that it was needless to summon an officer who was himself directing the issue of the writs of summons. The Chancery was an office of the Parliament from which every summons proceeded. The Chancellor consequently knew in his official capacity the appointed day and place of the meeting of Parliament.

As Chancellors they attended Parliament *ex officio*.

A remarkable illustration of the fact that the Chancellors attended in Parliament, though not summoned, occurs in the case of Sir Robert Bouchier, the first layman who held the office. There is no record of the issue of any summons to him. He was not a Peer of the Realm, and had no place in Parliament except as Chancellor. As Chancellor, however, he took his seat, and made that memorable protest which has been mentioned in another chapter. His successor, Sir Robert Parning, also a layman, and not a Peer of the Realm, never received any recorded summons as Chancellor, though, when previously Treasurer, he had been summoned among the Council. The next Chancellor was Robert de Sadington, who, though previously summoned among the Council, as Chief Baron of the Exchequer, was not summoned as Chancellor. His successor was John de Ufford, Dean of Lincoln, but again no summons to him appears. He was neither a Bishop nor one of the Temporal Peers, at the time, and must have been expected to be present *ex officio*.

The first lay Chancellors attended, but were not summoned.

Several Bishops afterwards succeeded to the Chancellorship, and were summoned as Bishops, but the next lay Chancellors, Thorpe and Knyvet, received no summons in the capacity of Chancellor. So also Sir Richard le Scrope, Chancellor in the second year of the reign of Richard II, had no recorded summons. Michael de la Pole, also a lay Chancellor, was summoned to Parliament, but summoned among the Barons, as he had been before he held the office,

A Baron Chancellor summoned only among the Barons.

CHAP. XV. and without any reference to it. John de Scarle, Chancellor at the beginning of the reign of Henry IV, had no recorded summons, nor had Sir Thomas Beaufort, another lay Chancellor.

The place of the Chancellor in the House, if a Commoner.

It appears needless to pursue the investigation further, as it is clear that, in accordance with the practice of centuries, the Chancellor's presence in Parliament was *ex officio*, and not in virtue of any writ of summons. He has for centuries been regarded, whether Peer or commoner, as the Speaker or Prolocutor of the House. His place on the woolsock is now usually said to be not technically within the House, though it is difficult to reconcile this opinion with the plain words of the Act of Henry VIII, that the seat is 'in the midst of the Parliament Chamber.' In that very Act, however, it was said that if below the degree of a Baron of Parliament, he had 'no interest to give any assent or dissent' in the House. He has now no voice or vote, if a commoner, though, in the reign of Edward III, he protested aloud. It seems not impossible that in the days when there were intervals of many years between Parliament and Parliament, his true position was forgotten. It is, however, manifest that the original idea as to his attendance in Parliament *ex officio* survived the separation of the Council from the Parliament, and that he continued to attend as Chancellor quite independently of the other Judges whose advice could be required by the House of Lords.

Chancellor, Keeper, and Commissioners of the Great Seal.

Though the Lord Chancellor has usually had charge of the Great Seal, there have been times when it has been entrusted to a keeper who was not Chancellor. This was, for the most part, a temporary arrangement, but towards the reign of Queen Elizabeth the arrangement was sometimes of a more permanent nature. An Act was then passed declaring that the Lord Keeper of the Great Seal for the time being shall have the same place, pre-eminence, and jurisdiction as the Lord Chancellor of England¹.

From a very early period it happened occasionally that the Great Seal was placed in the custody of several persons.

¹ Stat. 5 Eliz., cap. 18.

In later times these were known as Lords Commissioners of the Great Seal. Their position was not very precisely defined until the reign of William and Mary, when it was enacted that they should have all the authority of Lord Chancellor or Lord Keeper and should, if not Peers, rank 'next after Peers and the Speaker of the House of Commons¹.'

In relation to the office of Chancellor there is a disability which came into existence under the Test Act in the reign of Charles II, but which does not now affect Lords of Parliament in general. In 1829 an Act² was passed which, by removing the necessity for a declaration against transubstantiation, enabled Roman Catholics to sit in either House of Parliament. It was, however, at the same time specially provided that no person professing the Roman Catholic religion should thus be enabled to hold the Office of Chancellor, Lord Keeper, or Commissioner of the Great Seal³.

They cannot be Roman Catholics.

After the changes effected by Henry VIII, and the settling of the Lords in their places, the character of the House of Lords underwent but little further alteration until the accession of James I. The creations of new Peers were not much in excess of the extinction of peerages, and mere promotions in the peerage did not affect the total number of the Lords Temporal. After the long reign of Elizabeth there seem to have been only some sixty who were capable of sitting and voting in Parliament.

The character of the House underwent little change between the reign of Henry VIII and that of James I.

After James I came to the throne, however, the composition of the House of Lords was considerably modified. At one time he increased his revenue by the sale of Baronies for £10,000 each, Viscounties for £15,000, and Earldoms for £20,000. In one day (May 4, 1605) he made or promoted as many as eight Peers⁴. It is computed that he added no less than fifty-four⁵ laymen to the House of Lords.

Increase of the peerage in the latter reign.

¹ Stat. 1 Will. and Mary, cap. 21.

² Stat. 10 Geo. IV, cap. 7.

³ Sec. 12.

⁴ *Rot. Lit. Pat.*, 3 Jac. I, pt. 12, mm. 14-21.

⁵ This seems to be the number, after deducting from the total of creations, the promotions in the peerage, restitutions, confirmations, and creations of Scottish and Irish Peers.

CHAP. XV. Most of his successors have followed his example, not indeed, in accepting money for the dignities conferred, but by creating new dignities with profusion.

The events of the reign of Charles I and the Commonwealth. It has been mentioned, in the chapter on the legislative power of the House of Lords, that during the reign of Charles I, the Bishops were excluded from the House by Act of Parliament, that the Commons afterwards voted themselves to be the law-making power without the assent of King or Lords, that Oliver Cromwell found himself under the necessity, as he thought, of establishing an 'Other House,' or House of Lords, that there was legislation under Charles II by a House of Lords sitting without Bishops, and finally that the Act by which the Spiritual Lords had been excluded was repealed, and they were once again summoned to Parliament. These were but episodes in the main current of history, but a change which was effected during this period of disturbance had an important and lasting effect.

The abolition of feudal tenures. Feudal tenure by military service, which was an anachronism under the Stuarts, and was abolished during the Commonwealth¹, rose again into a nominal existence with the restoration of Charles II, only to be finally extinguished immediately afterwards. All tenures by knight-service of the King, or of any other person, were swept away, together with escuage, fines for alienation, wardships, liveries, primer seisins, ouster-le-mains, and values and forfeitures of marriages by reason of any such tenures².

Its effect in relieving the Peers of their burdens. Though this radical change affected some persons who were not Peers, it affected the Peers in such a manner as to completely change their relation to the King and to the State in general. Under the strict feudal system, and even under the feudal system when somewhat relaxed, there was no Earl and there was no Baron without lands, and the lands of Earls and Barons were held subject to very heavy burdens. Every Baron and every Earl, as being a Baron also, was in theory a soldier, and in theory bound to give his counsel to the sovereign. He had to provide men and

¹ 1656, cap. 4.

² Stat. 12 Charles II, cap. 24.

arms for war. or, if not men and arms, an equivalent in money. He had to come to the King's Councils and to Parliament when summoned, or, at any rate, to send a proxy with power to consent to any further burdens which were to be imposed. By the abolition of military tenure he was freed from the greatest part of his obligations.

The summons to Parliament, too, had long been regarded as an indication of his dignity rather than as a disagreeable incident of his position; and a Peer of the latter part of the seventeenth century was as little like a Peer of the reign of Edward II as a modern petty jury is like a petty jury of the thirteenth or fourteenth century. 'Suit of Court' was, indeed, preserved in general terms, but the feudal as well as other titles of honour, and the 'right to sit' in the House of Lords were saved to the Peers by special enactment, without any mention of attendance in Parliament as a necessary duty¹.

CHAP. XV.
Their titles of honour preserved by special enactment.

Not only was the position of those who enjoyed the older peerages altered, but later peerages were soon to be created under new conditions and for reasons which the Plantagenets and even the Tudors could hardly have understood. The sovereign began to govern by ministers who formed a Cabinet, and the Cabinet began to be representative of one of two opposing parties. The party which had not power was always striving to obtain it, always, no doubt, in the interest or alleged interest of the State. Political power, however, fell more and more into the hands of the Commons, and the tenure of office by a Cabinet came to depend on the possession of a majority in the Lower House. Service to the State consequently became, in a great measure, identified with service to a party; and service to a party was very closely associated with a command of votes. A peerage giving a new dignity, and not encumbered with any new burdens, was naturally a much coveted reward; and the creations of Peers since the Revolution, if not since the Restoration, have been largely in recognition of faithful adherence to political chiefs.

The newer creations thenceforth of a different character.

¹ Stat. 12 Charles II, cap. 24, sec. 5, and sec. 11.

CHAPTER XV.

CHANGES IN THE COMPONENT PARTS OF THE HOUSE OF LORDS.

PART II.

INTRODUCTION OF THE PRINCIPLE OF REPRESENTATION AMONG
PEERS: THE UNION WITH SCOTLAND: ATTEMPTS TO LIMIT
THE PEERAGE: THE UNION WITH IRELAND.

CHAP. XV.

The Union
with Scot-
land.

WHEN James VI of Scotland succeeded to the English throne as James I of England, there continued to be a separate kingdom of Scotland, and a separate kingdom of England, though the same sovereign was at the head of both. Each had its distinct Parliament and its distinct Peerage. The English House of Lords was consequently not affected by the accession of James I, or by the union of the two crowns, for more than a century. In the reign of Anne, however, a scheme was devised for the complete union of the two kingdoms, and of the two Parliaments.

No ad-
dition of
Spiritual
Lords to
the House
of Lords.

Articles of Union were drawn up and subsequently confirmed and ratified by Statute¹. The effect upon the House of Lords was to add sixteen Lords Temporal but no Lords Spiritual, the established Church of Scotland being Presbyterian and consequently without Bishops. The proportion of Spiritual to Temporal Lords was thus again diminished.

Election of
sixteen
representa-
tive Peers
for each
Parlia-
ment.

The sixteen Scottish Peers who, under the Articles of Union, acquired seats as Peers in the Parliament of Great Britain, were to be elected not as perpetual representatives, or as representatives for life, of the Peers of Scotland, but

¹ 5 Anne, cap. 8. (Statutes at Large.) The articles had been previously ratified and approved by an Act of Parliament in Scotland.

only as representatives for the particular Parliament for which a writ issued directing them to be summoned¹. So long as they were representatives they were to enjoy all the privileges which the Peers of England had previously had or might subsequently acquire, and in particular the right of sitting upon the trial of Peers. At trials of Peers in the interval between the dissolution of one Parliament and the calling of another into being the sixteen representatives who had sat in the last Parliament were to have the same powers and privileges as any other Peers of Great Britain². CHAP. XV.

It was provided that, after the Union, there should be one Great Seal for the United Kingdom of Great Britain, which was to be different from the Great Seal then used in either kingdom. This was to be used in sealing writs to elect and summon the Parliament of Great Britain, all treaties with foreign Princes and States, and all public acts, instruments, and orders of State which concern the whole United Kingdom. The Great Seal of England was to be used as before in all matters relating to England alone. Another seal was to be kept in Scotland and used in matters relating to private grants or rights which had usually passed the Great Seal of Scotland³. The Lord High Chancellor of England, having custody of the Great Seal of the United Kingdom of Great Britain, became thenceforward Chancellor of Great Britain, and so continued to be after the Union with Ireland, which retained an independent Lord Chancellor. The Chancellor of England becomes Chancellor of Great Britain.

All the Peers of Scotland (including those who were not among the sixteen representatives) were, after the Union, to be Peers of Great Britain, and have rank and precedence immediately after the Peers of the like orders and degrees in England at the time of the Union, and before all Peers of Great Britain of the like orders and degrees to be created after the Union. They were to be tried as Peers of Great Britain and enjoy all the privileges of Peers as fully as the Peers of England, except the right of sitting in the House Privileges of the Peers of Scotland.

¹ Stat. 5 Anne, cap. 8, sec. 1, art. 22.

² Art. 23.

³ Art. 24.

CHAP. XV. of Lords, and the right of sitting upon the trials of Peers, which were to be enjoyed only by the sixteen representatives.

A new principle of representation now introduced.

There was thus introduced into the ranks of the peerage a numerous class of Peers not entitled to sit in the House of Lords. There was introduced also an entirely new principle—that of representation in the House of Lords by means of election. The Sovereign did not send a writ of summons directly to each of sixteen Peers selected by himself as representatives, but a writ to the Privy Council of Scotland¹ commanding that body to cause the sixteen to be summoned. The sixteen were to be named by the Peers of Scotland, and that by open election and plurality of the voices of the Peers present and of the proxies of those absent². There were 165 upon the Roll, the greater part of whom (not being also Peers of England) remained Peers without seats in the House of Lords when their sixteen representatives had been elected.

The Privy Council of Scotland, in virtue of an Act passed very soon after the Act of Union, ceased to have any separate existence³, and new provisions had to be made for the return of the representative Peers. It was then enacted that when any Parliament of Great Britain was to be summoned and held, 'in order to the electing and summoning the sixteen Peers of Scotland,' a proclamation should be issued under the Great Seal of Great Britain commanding all the Peers of Scotland to meet, at an appointed time and place, in Scotland, to elect the sixteen in the manner before provided⁴.

Absence of provisions relating to extinction of old or creation of new peerages of Scotland: consequences.

In the Act of Union no provision was made with regard to the extinction of old or the creation of new Peerages of Scotland, and no power was given to Peers of Scotland to serve in the House of Commons of the Kingdom of Great Britain. In these respects the Union of England with Scotland differed materially from the Union of Great Britain with Ireland. It may have been considered that

¹ Stat. 5 Anne, cap. 8, sec. 1, art. 22.

² *Ib.*, secs. 12 and 13.

³ Stat. 6 Anne, cap. 6.

⁴ *Ib.*, cap. 23.

the creation of new Peers of Scotland with power of electing representatives would infringe the rights of the electors under the Act of Union. But their number was soon reduced by attainders following the rebellions of 1715 and 1745. Several descendants of those who were attainted were, indeed, restored by Acts of Parliament, in the reign of George IV, to the dignities enjoyed by their ancestors. Among the titles which then re-appeared upon the Roll were those of the Earls of Mar¹ and Carnwath², of Viscounts Strathallan³ and Kenmure⁴, and of Barons Nairn⁵ and Duffus⁶. The natural process of decay, however, threatens the ultimate extinction of the peerage of Scotland, which is already greatly diminished.

Very soon after the Union the question arose whether a Peer of Scotland could be created and sit as a Peer of Great Britain. James, second Duke of Queensberry, was created Duke of Dover in 1708, and sat in the House of Lords without opposition. In 1711, however, the Duke of Hamilton in the peerage of Scotland had a patent creating him Duke of Brandon in the Peerage of Great Britain. The House of Lords then declared (though only by a majority of five) that 'no patent of honour granted to any Peer of Great Britain, who was a Peer of Scotland at the time of the Union, entitled such Peer to sit and vote in Parliament, or to sit upon the trial of Peers⁷.' The reason of this declaration seems to have been that the majority of Lords considered the number of Scottish Peers who could sit in Parliament to be limited to sixteen in accordance with the principle of representation. Their resolution was not very judicious, because, as soon became apparent, the heir of a Scottish Peer could certainly be created and sit as a Peer of Great Britain, and would not lose his dignity when he succeeded to the Scottish peerage.

It was not, however, until the year 1782 that the Lords reconsidered their decision. They then consulted the

Ineffectual attempts to exclude from the House of Lords Peers of Scotland who were created Peers of Great Britain by Patent.

They now sit without question.

¹ 5 Geo. IV, 47.

² 7 Geo. IV, 52.

³ 5 Geo. IV, 48.

⁴ 5 Geo. IV, 49.

⁵ 5 Geo. IV, 50.

⁶ 7 Geo. IV, 51.

⁷ *Journals of the House of Lords*, Dec. 20, 1711 (vol. xix. p. 346).

CHAP. XV. Judges, who were unanimously of opinion that Peers of Scotland were not disabled by the Act of Union from being newly created and sitting as Peers of Great Britain. They accepted this doctrine, and made no further opposition ¹.

Peers of the United Kingdom cannot sit as representative Peers of Scotland.

This reversal of the previous declaration soon brought into prominence the question whether a representative Peer of Scotland acquiring, by inheritance or creation, a peerage of England or Great Britain, vacated his seat as a representative. There had been a case in 1736, when the Duke of Athole, being a representative Peer, established a claim to the English barony of Strange by inheritance, and yet continued to sit as representative. For some reason no opposition was made at the time, and there was consequently no definite decision. In 1786, however, two of the sixteen representative Peers were created Peers of Great Britain. One was William, fourth Duke of Queensberry, who though succeeding to the Scottish dukedom had not succeeded to the English dignities of the second Duke, and now had his patent as Baron Douglas of Amesbury. The other was James, eighth Earl of Abercorn, who had his patent as Viscount Hamilton. In the following year the matter was brought before the House of Lords, which resolved, in accordance with the report of a Committee of Privileges, 'that the Earl of Abercorn and the Duke of Queensberry had ceased to sit as representatives of the Peerage of Scotland ².'

But, as Peers of Scotland, they may vote for representatives.

It was long held by the House of Lords, that Peers of Scotland, disqualified for sitting as representative Peers, by reason of holding peerages of Great Britain, were disqualified to vote at the election of the representatives ³. In 1793, however, though there were some dissentients, the contrary opinion prevailed; and since that time all the Peers of Scotland, otherwise duly qualified, whether holding

¹ *Journals of the House of Lords*, June 6, 1782 (vol. xxxvi. p. 517).

² *Ib.*, Feb. 14, 1787 (vol. xxxvii. pp. 594-5); *Parliamentary History*, vol. xxvi. 598-607.

³ *Journals*, Jan. 21, 1708-9 (vol. xviii. p. 609); *ib.*, May 18, 1787 (vol. xxxvii. p. 709); *Parliamentary History*, vol. xxvi. 1158.

⁴ *Journals*, June 6, 1793 (vol. xxxix. p. 726).

separate peerages of Great Britain or of the United Kingdom, or not, have had their votes admitted. CHAP. XV.

The jealousy shown by the House of Lords just after the Union with Scotland, in their efforts to limit the number of Scottish Peers to the sixteen representatives, was exhibited somewhat later in another fashion. Queen Anne, with the object of securing a majority for the Court party, created no less than twelve Peers at once—a very considerable number in relation to the total of those already having seats. This use of the prerogative was disliked by the Peers of longer standing, and a few years afterwards they made an attempt to prevent any similar action in the future. In 1719 a bill was introduced in which it was proposed that ‘the number of Peers of Great Britain on the part of England’ should never be enlarged by more than six. There was, however, an exception in favour of Princes of the Blood Royal; and upon the extinction of a peerage the Sovereign might fill up the vacancy. It was also proposed that the principle of electing representative Peers of Scotland should be abandoned, and that twenty-five hereditary Peers should take the place of the sixteen representatives¹.

Attempts of the Lords to restrict the creation of peerages, and alter the terms of the Union.

The third reading of the bill in the House of Lords was adjourned from the 14th to the 24th of April, and Parliament was prorogued on the 18th. In the following November, however, another bill of similar purport, after passing the House of Lords, was sent down to the House of Commons. Had it become law, it would have forced the development of the Constitution in later times into a totally different channel. The Commons saved the prerogative of the Crown; and it was remarked, in a somewhat cynical manner, by Blackstone that their leaders ‘were then desirous to keep the avenues to the other House as open and easy as possible².’ Robert Walpole at any rate strongly opposed the Bill, which was lost by a majority of 269 to 177³.

The attempt defeated by the Commons.

The Union with Ireland had the effect of introducing two new representative elements into the House of Lords.

The Union with Ireland: two

¹ *Parliamentary History*, vol. vii. 589–594.

² 1 Com. 157.

³ *Parliamentary History*, vol. vii. 606–627.

CHAP. XV. The established Church of Ireland being at the time Episcopal, and not like that of Scotland Presbyterian, the Lords Spiritual of Ireland, as well as the Lords Temporal, obtained representation in the Parliament of the United Kingdom.

new representative elements added.
Union of the Churches of England and Ireland.
In the year 1800, the two Houses of the two Parliaments of Great Britain and of Ireland respectively, agreed upon articles for the union of Great Britain and Ireland, in order, as was said at the time, 'to promote and secure the essential interests of Great Britain and Ireland, and to consolidate the strength, power, and resources of the British Empire¹.' By the fifth article it was provided that the Churches of England and Ireland, as then established, should be united into one Protestant Episcopal Church, to be called the United Church of England and Ireland. A clause was added which has a strange sound, since, by the irony of fate, the Church of Ireland has been disestablished: 'the continuance and preservation of the said united Church as the established Church of England and Ireland shall be deemed and taken to be an essential and fundamental part of the Union².'

According to the fourth article four Lords Spiritual of Ireland, 'by rotation of Sessions,' and twenty-eight Lords Temporal of Ireland, elected for life by the Peers of Ireland, were to be the number to sit and vote, on the part of Ireland, in the House of Lords of the Parliament of the United Kingdom³.

The mode of summoning and returning both the Lords Spiritual and the Lords Temporal was regulated by an Act passed in the Parliament of Ireland before the commencement of the Union, and incorporated in the English and Irish Acts of Union.

Four representative Bishops to sit by rotation of sessions.
With regard to the Lords Spiritual it was provided that one of the four Archbishops of Ireland, and three of the eighteen Bishops of Ireland, should sit in the House of Lords of the United Parliament in each session. The Primate of all Ireland (the Archbishop of Armagh) was to

¹ Stat. 39 & 40 Geo. III, cap. 67, Preamble.

² *Ib.*, cap. 67. sec. 1. art. 5.

³ *Ib.*, art. 4.

sit in the first session, the Archbishop of Dublin in the second, the Archbishop of Cashel in the third, the Archbishop of Tuam in the fourth, and so by rotation of sessions 'for ever,' the rotation to proceed regularly and without interruption from session to session, notwithstanding any dissolution or expiration of Parliament. The three suffragan Bishops were also to sit according to rotation of sessions in the order set forth in the Act.

With regard to the Lords Temporal it was provided that the twenty-eight representatives should be elected by the Temporal Peers of Ireland in the manner prescribed. Those chosen by the majority of votes were, during their respective lives, to sit as representatives of the Peers of Ireland in the House of Lords of the United Kingdom, and be entitled to receive writs of summons to every Parliament ¹.

Twenty-eight representative Lords to be elected for life.

The four Lords Spiritual sitting by rotation of sessions, and the twenty-eight Lords Temporal sitting as representatives for life, were to have the same privileges of Parliament as those belonging to the Lords of Parliament on the part of Great Britain, and the same rights in respect of sitting and voting on the trial of Peers. All the Lords Spiritual of Ireland were to have rank and precedence immediately after the Lords Spiritual of the same rank and degree of Great Britain, and enjoy the same privileges, except those of sitting in the House of Lords and on the trial of Peers, which were restricted to the four sitting by rotation. All the holders of temporal peerages in existence at the time of the Union were to have rank and precedence immediately after all persons holding peerages of the like orders and degrees in Great Britain. All peerages of Ireland created after the Union were to have 'rank and precedence with the peerages of the United Kingdom so created according to the dates of their creations.' All peerages both of Great Britain and Ireland were, in all other respects, to be considered peerages of the United Kingdom. The Peers of Ireland were, as Peers of the United Kingdom, to be sued and tried as Peers, and

Privileges of the Lords Spiritual and Temporal of Ireland.

¹ Stat. 39 & 40 Geo. III, cap. 67. sec. 1. art. 4, and sec. 2.

CHAP. XV. were to enjoy all privileges of peerage as fully as the Peers of Great Britain, except those of sitting in the House of Lords and on the trial of Peers, which were restricted to the twenty-eight representatives ¹.

Restriction of the number of peerages of Ireland : provisions for new creations. Special provisions were made with regard to the number of peerages of Ireland which were to continue in existence. No new creation of a Peer of Ireland was to be made until three of the existing peerages had become extinct, but as often as three became extinct one new peerage might be created. As soon, however, as the number had been reduced to one hundred, the Crown might create one Peer whenever any one of the hundred peerages became extinct, so that the Peerage of Ireland might be kept up to the number of one hundred, over and above the number of Irish Peers who might be entitled, by descent or creation, to an hereditary seat in the House of Lords of the United Kingdom ².

Position of Peers of Ireland as members of the House of Commons. A Peer of Ireland might, unless he was one of the Irish representative Peers, be elected and serve in the House of Commons of the United Kingdom, as member for any county, city, or borough of Great Britain, but not of Ireland. As long, however, as he continued to be a member of the House of Commons, he was not to be entitled to the privilege of peerage, or capable of being elected one of the Irish representative Peers, or of voting at any election of such Peers, and he was liable to be sued, indicted, and tried as a commoner ³.

The Spiritual Lords of Ireland excluded from the House on the Disestablishment of the Church of Ireland. The proportion of four Spiritual Lords to twenty-eight Temporal Peers, as representatives for Ireland, was, perhaps, not unfairly arranged in relation to the existing numbers of each class. The effect, however, was to add only four to the total number of Spiritual Lords in the House, and not in any way to give increased power to the Church. Even this small accession of strength to the Lords Spiritual was destined to be lost in seventy years. In 1869 was passed the Act 'to put an end to the establishment of the Church of Ireland ⁴.' The union of the Churches of England and

¹ Stat. 39 & 40 Geo. III, cap. 67. sec. 1. art. 4.

² *Ib.*

³ *Ib.*

⁴ The Irish Church Act, 1869.

Ireland was then dissolved, and the Church of Ireland CHAP. XV. ceased to be established by law. It was also expressly provided that, after the end of the year 1870, no Archbishop or Bishop of the Church of Ireland should, in that capacity, be summoned or qualified to sit in the House of Lords ¹.

The representatives of the Temporal Peers of Ireland were of course not affected by a Statute which had reference solely to the Church, and they retained their right to sit after election, in accordance with the terms of the Act of Union. In the same year, however, a bill was introduced by Earl Grey with the object of making a change in their position. It was proposed that their number should be no longer limited to twenty-eight, but should be not less than twenty-eight and not more than thirty. It was also suggested each Peer having a right to vote at the election of representatives should be empowered to give three votes instead of one, and to give them all in favour of a single candidate or to divide them amongst two or three, as he might think fit.

Changes proposed in relation to the representative Peers of Ireland in the same year.

A greater change was contemplated in relation to the representative Peers of Scotland. It was proposed that instead of sitting only during one Parliament, they should be elected, like the representative Peers of Ireland, for life; and that their number should not be restricted to sixteen, but should be not less than sixteen and not more than eighteen. Like the Irish Peers, the Scottish Peers were to be allowed three votes at an election of representatives, and either to give them all for a single candidate or to divide them ².

And in relation to the representative Peers of Scotland.

When, however, the second reading of the bill was moved, an amendment was carried to the effect that the subject in general should be referred to a select committee ³. The committee was duly appointed, and a report ⁴ was received from it, but no further action was taken, and the law concerning the representative Peers of Scotland and Ireland remains unchanged.

The proposals not carried.

¹ The Irish Church Act, 1869, sec. 13.

² H. L., No. 50. Ordered to be printed, April 9, 1869.

³ Hansard's Debates, third series, vol. cxcv, 1677-1694.

⁴ H. L., No. 112, June 3, 1869.

CHAPTER XV.

CHANGES IN THE COMPONENT PARTS OF THE HOUSE OF LORDS.

PART III.

RAPID INCREASE IN THE NUMBER OF PEERS: MODERN ATTEMPTS
TO EXCLUDE THE BISHOPS: PEERAGES FOR LIFE: CONCLUSION.

CHAP. XV.

The number of Temporal Lords at the accession of George I. Continual increase in the number of Peers: the Reform Bills of 1831.

WHEN George I came to the throne the number of Temporal Lords had already risen to 194, of whom sixteen were the Representative Peers of Scotland. There were thus 178 Peers having hereditary seats in the House of Lords, of whom twenty were minors¹.

From this time forward the process of creating new hereditary peerages has continued, as well as the natural process of extinction; but, since the accession of George III, the growth of new Peers has far exceeded the disappearance of ancient titles, and has almost kept pace with the rise in the population of the British Islands. Ministry after ministry, whatever its politics, has rewarded its followers with honours, and the creation of the new dignities more and more rapidly outstrips the decay of the old. At the coronation of George IV, and again at the coronation of William IV, there was a large simultaneous creation of new Peers. The dignities conferred by William IV may have had some relation to the struggle over the Reform Bills of 1831; and there seemed at one time a probability that this mode of coercing the Lords would be applied on a far greater scale. As explained, however, elsewhere, the difficulty was overcome in another way, and the development of the peerage went on, in even tenour, as before.

¹ List of the Lords Spiritual and Temporal, &c. Printed 1715.

The feelings evoked by the Reform Bills of 1831-2 were not immediately reduced to an absolute calm, and shortly afterwards (in 1834) found vent in a project to exclude the Bishops, once again, from the House of Lords. The House of Commons, nevertheless, refused even leave to bring in a Bill 'for relieving the Archbishops and Bishops of the Established Church from their legislative and judicial duties in the House of Peers¹.' The attempt was made again in different forms in 1836 and 1837, but on each occasion the Commons negatived, by very large majorities, the proposed resolutions which reflected on the position of the Bishops among the Temporal Lords in the Upper House².

CHAP. XV.

Abortive projects to exclude the Bishops from the House, 1834-37.

Nearly twenty years elapsed before there was any further agitation of a serious kind with regard to the constituent parts of the House of Lords. A question was then raised which led to a remarkable controversy in the House of Lords itself. It was the cause of much learned argument, and of a careful search for ancient precedents. For its due comprehension a short historical retrospect is necessary.

The question as to peerages for life: an historical retrospect necessary.

The power of the Crown to create a subject a Peer for life has sometimes been contested, sometimes very warmly supported. It is, however, needless to carry the investigation further back than the time at which the expression Peer of the Realm first came into use.

Robert de Vere, Earl of Oxford, was in the reign of Richard II created Marquess of Dublin for life³. Though, however, he acquired a new dignity for life only, he was not thus made a Peer, because he was already a Peer when he was made a Marquess. Moreover, this creation was not by the King alone, but with the assent of the Lords and Commons in Parliament. He shortly afterwards surrendered his patent of creation as a Marquess, and was then

Robert de Vere, when made Marquess of Dublin and Duke of Ireland, for life, in the reign of Richard II, was already a Peer.

¹ *Journals of the House of Commons*, March 13, 1834 (vol. lxxxix. p. 120).

² *Ib.*, April 26, 1836 (vol. xci. p. 293), and Feb. 16, 1837 (vol. xcii. p. 57).

³ *Rot. Parl.*, 9 Ric. II, no. 17 (printed, vol. iii. p. 209).

CHAP. XV. created Duke of Ireland by a charter which did not confer any rights of inheritance¹. This again did not make him a peer for life; it gave only an addition to the Earldom of Oxford which he already enjoyed. It did not in any way affect the claim of his heirs to be Peers as Earls of Oxford. It was only a promotion made by the King, to which the Lords and Commons in Parliament assented.

Edward,
son of
Edmund
Duke of
York,
created
Earl for the
term of his
father's life

Edward, son of Edmund Duke of York, was in the same reign created Earl of Rutland, not for his own life, but for the life of his father. This also was with the assent of the Lords and Commons in Parliament². The case does not seem to have any relation to life-peerages in the ordinary acceptance of the term.

Promotion
of Peers in
the reign of
Richard II.

Eight years afterwards (in the twenty-first year of the reign of Richard II) there were several promotions in the peerage, which though not for life only, have nevertheless an important bearing on the subject of peerages for life. Thomas Holland, Earl of Kent, was created Duke of Surrey; John Holland, Earl of Huntingdon, was created Duke of Exeter; Edward, Earl of Rutland, was created Duke of Albemarle; John Beaufort, Earl of Somerset, was created Marquess of Dorset; and Thomas, Lord le Despenser, was created Earl of Gloucester. All these creations took effect on Michaelmas Day, when the King sat in Parliament, wearing his crown, and holding his sceptre. The charters of creation had been already drawn out and were read in Parliament; and there the ceremony of investiture was solemnly performed. In each case the newly-made Dukes, Marquess, and Earl were to hold their dignities to themselves and the heirs male of their bodies³. In none of these cases was there any new Peer created.

¹ *Rot. Chart.*, 10 Ric. II, no. 2 (printed in *Rep. Dig. Peer*, vol. v. p. 79).

² *Rot. Parl.*, 13 Ric. II, no. 23 (printed, vol. iii. p. 364); *Rot. Chart.*, 13 Ric. II, no. 5 (printed in *Rep. Dig. Peer*, vol. v. p. 85).

³ *Rot. Parl.*, 21 Ric. II, no. 35 (printed, vol. iii. p. 355); *Rot. Chart.*, 21 Ric. II, nos. 21, 23. The charter to Beaufort appears on the roll to have been vacated, but the creation in Parliament seems nevertheless to have been considered operative.

When Henry IV ascended the throne, two years later, CHAP. XV. all these recently-promoted Peers were degraded to their previous rank, but not deprived of their peerage. A judgement to this effect was pronounced in Parliament by the Chief Justice of the Court of Common Pleas as being that of the Lords in Parliament with the assent of the King. It was to affect both the persons named and their heirs¹.

Degradation of the same Peers in the reign of Henry IV.

The inference from these events is that a promotion in the peerage was not held to be subject to the same rules as the creation of a new peerage. It gave precedence among Peers, but nothing more. The Crown seems to have claimed the right to give precedence, as one of its prerogatives, but not, perhaps, without limitation. This, too, would be strictly in accordance with the old idea of the *Pares Curiae* or *Curtis*, or great feudal tenants of the Crown. They all equally owed service to the King's Court, and none could be judged in such a manner as to lose his fief except with the assent of his peers. They thus formed a class apart from the rest of the population, even though the King might, either with or without their assent, assign the position in which they were to sit. When they became Peers of the Realm, instead of *Pares Curtis*, their rank as Peers distinguished them from other subjects in the realm, and was independent of their relations one to another. A promotion in the peerage was, therefore, altogether different in nature from the creation of a Peer.

Promotions in the peerage not subject to the same rules as new creations of Peers.

In the reign of Henry V, Thomas Beaufort, Earl of Dorset, was created Duke of Exeter by the King sitting in Parliament, and straightway took his seat in the presence of the Lords Spiritual and Temporal, and of the Commons in Parliament assembled². In the Letters Patent bearing date the same day (November 18, 1416), the creation purports to be by the King alone, and for life only³.

Case of Thomas Beaufort, Duke of Exeter, in the reign of Henry V.

¹ *Rot. Parl.*, 1 Hen. IV, *Placita Coronae*, no. 9 (printed, vol. iii. pp. 451-452).

² *Ib.*, 4 Hen. V, no. 13 (printed, vol. iv. p. 96).

³ *Rot. Lit. Pat.*, 4 Hen. V, m. 11 (printed in *Rep. Dig. Peer*, vol. v. p. 182).

CHAP. XV. A grant was nevertheless made, at the same time, at the request of the Commons, and with the assent of the Lords Spiritual and Temporal, of one thousand pounds per annum to the Duke and the heirs male of his body, for the better support of the dignity¹. It seems, therefore, that it was in contemplation to give him more than an estate for life in his dukedom. In any case it will be observed that this is not an instance of a creation of a Peer for life, as Thomas de Beaufort was already a Peer and an Earl, and the loss of his dukedom would not have deprived him of his peerage.

Peeresses
for life:
these do
not affect
the consti-
tution of
the House
of Lords.

In the reign of James I, Mary, Lady Compton, the mother of the King's favourite, George Villiers (successively Baron Whaddon, Viscount Villiers, Earl², Marquess, and Duke of Buckingham), was created Countess of Buckingham for her life³. This creation, however, did not and could not have any effect upon the constitution of the House of Lords. It was a mere compliment to the lady. The limitation for her life was a matter of necessity, because otherwise the Buckingham title would have descended to her eldest son John, afterwards Viscount Purbeck, and there would have been two Buckingham peerages possessed by two brothers.

There are several other instances of the creation of Peeresses for life only, in the higher grades of the peerage; but, until quite recently, there had been only one creation of a Baroness for life, that of Baroness Belasyse in 1674. None of these cases, however, are of much importance in the history of the House of Lords, because neither the Peeress for life only, nor her issue, as her heir, could have any seat in the House.

Contradic-
tory state-

Sir Edward Coke is sometimes cited as an authority to

¹ *Rot. Lit. Pat.*, 4 Hen. V, m. 13 (printed, pp. 182-183).

² This fact is stated somewhat differently by the Earl of Clarendon in his *History of the Rebellion*: 'though she was married to a private gentleman, Sir Thomas Compton, she had been created Countess of Buckingham, shortly after her son had first assumed *that title*.'

³ *Rot. Lit. Pat.*, 16 James I, part 11. no. 10.

prove the antiquity of peerages for life. His words, however, do not altogether appear to warrant the meaning attributed to them. If a baron 'be created by patent,' says Coke, 'he must of necessity have these words, his heirs or the heirs males of his body, or the heirs of his body, or otherwise he hath no inheritance¹.' The interpretation, however, is not that he has a peerage for life. Sir Edward Coke himself tells us exactly the reverse. If a Baron 'be created by Letters Patents the state of inheritance must be limited by apt words, *or else the grant is void*².' There may be nobility 'for term of life, by act in law, without any actual creation; as, if a Duke take a wife, by the intermarriage she is a Duchess, and so of a Marquess, an Earl, and the rest³.' This again would, of course, not in any way affect the constitution of the House of Lords.

CHAP. XV.

ments of
Coke as
to life-
peerages

In another passage, however, Coke does say that 'as an estate for life may be gained by marriage, so may the King create either man or woman noble for life, but not for years, because then it might go to executors or administrators⁴.' He bases this statement solely on one of his own reports⁵, but the report does not seem to be a sufficient ground for so wide a generalization. The case which he cites is one having relation not to peerages generally but to offices, and in particular to the office of Marshal of the Marshalsea. The point which was determined was that the grant of the office for a term of years was void. It was said, *obiter*, by way of illustration, that in ancient times an Earl had the custody of 'a county and was called Shire Reeve, and that afterwards this custody was transferred to the Sheriff, who was the Earl's deputy. 'But, as the King cannot grant to one that he and his executors or administrators shall be Counts or Earls for years (for then his executors or administrators, one being appointed by himself, the other by the Ordinary, would be Earls), so, without question the King may create an Earl for life, in tail, or in fee.'

*Obiter
dictum* as
to creation
of Earls
for life.¹ *Co. Litt.*, 9 b.² *Ib.*, 16 b.³ *Ib.*⁴ *Ib.*⁵ 9 Rep. 97-98 (Reynel's case).

CHAP. XV. This remark, not made in any case having relation to the peerage, made in a case having relation solely to offices, and made in illustration of the estate which could be acquired in an office, has been quoted again and again to show that the Crown has the power to create a peerage of any kind for life. The citation of the same case, generation after generation, has produced the appearance of unanimous belief among the legal authorities who have cited it during two centuries and a half. The opinions founded upon it, however, cannot be of greater weight than the report itself, and in the report there is practically no decision at all upon the general question of life peerages.

It had no relation to Peers in general, but only to Earls in an official capacity.

As has been shown elsewhere, an earldom was, in its origin, an administrative, legal, and military office, which only became strictly hereditary by degrees. The Judges in Reynel's case brought into prominence the official character of the early earldoms in order to use it in illustration of the points under consideration. They did not say that the King could make any man a Peer of any rank for his life alone, because he could not make a Marshal of the Marshalsea for a term of years only, but they did say that he could not make a Marshal of the Marshalsea for a term of years, because he could not make other officers, and among them Earls, for such a term. No point affecting the peerage was touched in the report except that of the earldoms in their official character, and even that point was not discussed in relation to any particular earldom. Since the time of the Conquest the Earls had commonly been Barons, and the creation of an Earl, either for life or otherwise, was not necessarily or even probably the creation of a new Peer. The remark in Reynel's case had thus no practical bearing on the question whether the Crown could create a new Peer for the term of his life alone.

Lords for life without peerage.

When there is an express provision that a man having a grant of the name and title of Lord is to have no place or voice in Parliament, it must be obvious that he has

no place in the history of the House of Lords. It is, therefore, unnecessary to say anything more of Lord Hay, who was made a Lord of this kind in 1606¹, or of any similar case. They have practically no bearing upon the power of the Crown to create a Peer for life only with all the privileges of peerage. CHAP. XV.

Thus far all the supposed proofs of the creation of a life-peerage in the person of a man seem to fail. There are, as we have seen, instances of promotions in the peerage for life only. There are also many instances of the creation of Peers for life, with remainders over to other persons and their heirs². These, however, are not true instances of the creation of peerages for life, though the first holder, in each case, enjoyed the peerage for his life only.

No early instance of creation of a new peerage, for his life only, in the person of a man.

There is an important difference between the creation of a Peer for life and the creation of a life-peerage. No one, whatever the form of creation, can enjoy his peerage for a longer term than his life. If any one could be created a Peer for his own life only, without any remainder, he would hold a life-peerage. If any one is created a Peer for his own life with a remainder over, though he becomes a Peer for life, the peerage is not a life-peerage alone. An estate in the peerage vests in the remainder-man at the same time as in the Peer for life; the remainder-man has a present interest in his future

Difference between creation of a Peer for life and creation of a peerage for life.

¹ *Rot. Lit. Pat.*, 4 Jac. I, part 1. m. 36.

² Among these may be mentioned the creation in 1628 of Baptist Hicks as Baron Hicks and Viscount Campden, for life, with remainder to Edward, Baron Noel of Ridlington and the heirs male of his body (*Rot. Lit. Pat.*, 4 Car. I, part 39. no. 7); that of Francis, Baron of Dunsmore, in 1644, as Earl of Chichester, for life, with remainders over (*Rot. Lit. Pat.*, 20 Car. I, no. 12); that of Hugh, Duke of Northumberland, in 1784, as Lord Lovaine, Baron of Alnwick, for life, with remainder to a second son Algernon Percy, and the heirs male of his body (*Rot. Lit. Pat.*, 24 Geo. III, part 4. no. 6); and that of George, Duke of Montagu, in 1786, as Baron Montagu of Boughton, for life, with remainder to the second and other sons of Elizabeth, Duchess of Buccleuch, successively in tail male (*Rot. Lit. Pat.*, 26 Geo. III, part 9. no. 18). The last creations, it will be observed, did not give any new seat in the House of Lords until the remainders came into operation.

CHAP. XV. peerage. The peerage differs from one in the more ordinary form of creation only in the limitation affecting the successors of the first holder. It is true that in such cases the blood of the first holder is not ennobled, but it will be found that where such cases have occurred the first holder had no issue, or was already of noble blood and acquired a new peerage, though nominally for his own life, yet really, by force of the remainder, for some member of his own family. Except in virtue of recent Statutes there has, since the time when the expression 'Peer of the Realm' first came into use, never, so far as is known, been any creation for life alone, which has conferred a new seat in the House of Lords.

Attempt to
give a life-
peerage
only to
Sir James
Parke, as
Baron
Wensley-
dale, in
1856.

The subject of life-peerages was never brought into prominence and never underwent serious discussion before the year 1856. It was at that time thought expedient to strengthen the House of Lords in the judicial capacity, and it was apparently believed that for this object Peers might be created for life only. It was supposed that the House might thus have valuable aid from men whose means would be insufficient to support the dignity of an hereditary peerage. Under the advice, as it would seem, of Lord Cranworth, who was then Lord Chancellor, Her Majesty directed the issue of Letters Patent purporting to create Sir James Parke (who had been one of the Barons of the Exchequer) Baron Wensleydale and a Peer 'for and during the term of his natural life.'

Proceed-
ings of the
Lords :
Resolution
that the
grantee
could not
sit and vote
in Parlia-
ment.

The Patent bore date January 16. On the following February 7 there was a long debate in the House of Lords ; and on the motion of Lord Lyndhurst, an ex-chancellor, the Letters Patent were referred to the Committee for Privileges by a majority of thirty-three. There was a long discussion in the Committee for Privileges on February 12, a further debate in the House on the same day, and another discussion in the Committee for Privileges on February 18. On February 22 a motion was made, in the House, that the question should be referred to the Judges, and this, after debate, was negatived. On the

same day Lord Lyndhurst moved, in the Committee for Privileges, a resolution 'that neither the said Letters Patent, nor the said Letters Patent with the usual writ of summons, enable the grantee to sit and vote in Parliament.' On a vote being taken there were Content ninety-two, Non-content fifty-seven, or a majority of thirty-five in favour of the motion. When the report of the Committee for Privileges was brought up on February 25, Lord Granville intimated that the Government would not oppose its confirmation. It was then 'resolved and adjudged by the Lords Spiritual and Temporal in Parliament assembled' in accordance with the terms of the report.

Although, however, there was no opposition on the part of the Government, there were several protests. They were in three different forms. The first was signed by Baron Cranworth, Baron Sundridge (the Duke of Argyle), Earl Granville, Baron Stanley of Alderley, the Marquess of Lansdowne, the Earl of Harrowby, Baron Panmure, Baron Glenelg, the Marquess of Breadalbane, and Viscount Sydney. The grounds of their dissent were, among others, that 'according to the uniform opinions of the highest legal authorities, for above two centuries and a half, the Crown has the prerogative of creating a Peer for life,' and that 'the creation of a peerage for life with a limitation in the patent to collateral relatives has been common even in modern times, and no such patent would have been valid if the prerogative contended for did not exist.'

Protest by
dissentient
Lords.

Except the Chancellor, none of the dissentient Peers, however eminent in other ways, were specially qualified to pronounce an authoritative opinion on the technical matters set forth in their protest. The Chancellor, having advised the grant of the Letters Patent, was bound to support it. Earl Granville and other supporters of the Government naturally took the same side.

Another protest was made by Earl Grey and the Earl of Devon partly on the same grounds as that of the Peers already mentioned, but partly on others, and more in detail.

Second
protest.

CHAP. XV. A third protest of great length was signed by Baron Monteagle of Brandon, Baron Glenelg, who had signed the first protest, and the Earl of Devon who had signed the second. This concluded with the final reason that the adoption of the report was dangerous as a precedent 'when it is considered that a motion has been made and rejected requiring the attendance of the learned Judges with the view of obtaining their opinion on the legal import and just construction of the Letters Patent of the Crown laid before the House, and referred to the Committee for Privileges.'

Third protest, partly on the ground that the Judges had not been asked to advise.

This last was, perhaps, the best point made in any of the protests. The Judges had without doubt been called in on previous occasions when legal questions were involved—and that long after the Judges had ceased to sit with the King in his Council in his Parliament. The weak side of the argument was that the Lords had not always accepted the opinion of the Judges when given, and were under no obligation either to ask it or to take it. In the present instance, as the Lord Chancellor took one view, and an ex-Lord Chancellor the opposite view, it is not very probable that the Judges would have been in absolute agreement, or that the House would have felt itself bound by their decision even if unanimous.

Hereditary peerage in the end given to Lord Wensleydale.

For a short time Baron Wensleydale was in the position of a Baron without a seat or a voice in Parliament. It was not denied that the Crown might confer upon a subject the title of Baron for his life, but it was not admitted that the Crown could in this manner give him a place in the House of Lords. The Lords had long taken all questions of their own privileges into their own hands, and they regarded this as a question of privilege. A few months later, however, (July 23, 1856), 'Baron Wensleydale of Wensleydale in the North Riding of the County of York,' for life, was created by new Letters Patent 'Baron Wensleydale of Walton in the County Palatine of Lancaster, unto him and the heirs male of his body lawfully begotten and to be begotten.' Having then acquired an hereditary peerage,

he was duly summoned to Parliament, and took his seat in the House of Lords¹. CHAP. XV.

Thus ended an important contest—whether rightly or wrongly it might, perhaps, be presumptuous to say, when the two great legal authorities engaged in the fray took different sides. The House of Lords, however, was at least theoretically competent to give a final decision, and the readers of these pages will have seen on what very strong reasons their judgement might have rested if the question was a question of privilege, and if it was to be determined by precedents subsequent to the time when the expression ‘Peer of the Realm’ first came into use.

Notwithstanding this decision, it was felt that, if the House of Lords was to retain its appellate jurisdiction, there was a need of skilled members, and that the most competent persons might not be able to make sufficient provision for the support of an hereditary dignity. A Bill was shortly afterwards introduced into the House of Lords, on the recommendation of a committee, in which it was proposed to give the Crown the power of conferring peerages for life upon two persons who had served for five years as Judges. They were to sit with the Lord Chancellor as Judges of Appeal and to be Deputy-Speakers. The project, however, though it passed a second reading, ultimately miscarried in the House of Commons².

A subsequent life-peerage Bill miscarries.

The question of life-peerages was now allowed to slumber for thirteen years. In 1869, however, Earl Russell again agitated the subject. He introduced into the House of Lords a Bill of far wider scope than that of 1856. The resolution of the House that Sir James Parke when created a Baron of the United Kingdom for life was not entitled to

Earl Russell's Bill for the creation of life-peerages in 1869.

¹ The various documents, debates, and discussions relating to the Wensleydale Peerage are conveniently brought together in the *‘Discussion and Judgement of the Lords on the Life Peerage Question.’* Reports by John Fraser Macqueen. Under Appointment of the House.

² Hansard's *Debates*, 3rd series, vol. cxlii. 780-797, 899-921, 1059-1084; vol. cxliii. 407-433, 568-613.

CHAP. XV. sit and vote in Parliament was recited in the preamble, in which also it was declared to be 'expedient that Peers created for life should, in limited number, and under certain conditions, be entitled to sit and vote in the House of Lords.' It was proposed that Peers created for life by the Sovereign should be entitled to receive writs of summons as Peers of Parliament, to sit, and to vote, and should have all the rights and privileges of Peers of Parliament, during their respective lives. They were to be selected by the Crown from Peers of Scotland or Ireland; from persons who had sat as members of the House of Commons more than ten years, from officers of the army and navy eminent for distinguished services, from persons who were or had been Lord Chancellor, Lord Chief Justice of the Queen's Bench or Common Pleas, or Lord Chief Baron in England or Ireland, or Lord Justice General in Scotland, from persons who had been for two years and had ceased to be Judges of the principal Courts of Common Law at Westminster or in Ireland, the Court of Chancery in England or Ireland, the Court of Session in Scotland, the Court of Probate and Divorce, or the High Court of Admiralty in England, from persons who had been Attorney-General for England or Ireland, Lord Advocate for Scotland, or Queen's Advocate-General for England. They might also be selected from persons distinguished for their attainments in science, literature, or art, and from persons who had served in any public office under the Crown with ability and fidelity for not less than five years. It was, however, to be provided that no more than twenty-eight peerages of this character were to be in existence at the same time, and that no more than four were to be created in any one year¹.

The
scheme as
amended
by Lord
Cairns.

The principle of the Bill was well supported, though there was much opposition on points of detail. Lord Cairns proposed to amend it, in Committee, in a manner which was practically a reconstruction. For Earl Russell's clause in the preamble he wished to substitute one to the effect

¹ H. L., no. 49. Ordered to be printed April 9, 1869.

that 'it is expedient to afford, under certain restrictions, CHAP. XV. facilities for the introduction into the House of Lords of persons distinguished in the services of the State, or who, from their attainments or official position, are likely to add weight to the deliberations of the House, and who may not be desirous to undertake the burden of an hereditary peerage.' He desired also to strike out all the clauses relating to the special qualifications of the persons to be selected, as well as those relating to the limitations of number, and to substitute for them a provision that only one life peerage should be created in any one year except in favour of the Lord High Chancellor of Great Britain, a Principal Secretary of State, the President of the Council, Board of Trade, or Poor Law Board, the Postmaster-General, or the Chancellor of the Duchy of Lancaster¹. Earl Russell held to his total of twenty-eight in all and four in any one year, but abandoned his clauses relating to the classes of persons from which the selection was to be made, suggesting in their place a clause in the preamble as to creation of Peers 'on account of their eminent merits or distinguished services to their country².' The Earl of Carnarvon moved, in Committee, to insert a clause that whenever a Peer created for life should be entitled under the proposed Act to sit and vote in the House of Lords, the grounds upon which the peerage should be conferred upon him should be stated in the patent of creation³. Amendments were also moved in Committee by Earl Stanhope⁴ and Lord Penzance⁵, which were not accepted either wholly or in part.

When the Bill emerged from Committee and was reported to the House, it partook of the character of Lord Cairns's amendments quite as much as of Earl Russell's original draft. All the clauses relating to special qualifications were omitted, the number of life peerages to be created in any one year had been restricted to two, and Lord Cairns's alteration of the preamble had been adopted with the

The Bill
rejected.

¹ H. L., no. 49 a, May 5, 1869. ² H. L., no. 49 b, May 5, 1869.

³ H. L., no. 49 c, May 13, 1869. ⁴ H. L., no. 49 d, May 21, 1869.

⁵ H. L., no. 49 e, June 1, 1869.

CHAP. XV. exception only of the words relating to 'the burden of an hereditary peerage.' Earl Russell's original limitation of the total number of life-peerages to twenty-eight still remained¹. The Bill, however, failed to pass its third reading. The question whether this result was fortunate or unfortunate is one of politics, but the desire expressed in the amended preamble, to introduce into the House of Lords persons likely to add weight to the deliberations of the House, appears a happy adaptation of the ancient reason for a Parliamentary summons to modern life and modern ideas.

Proposal of
1870 to
exclude
future
Bishops
from the
House.

The action taken in the House of Commons in 1870 with regard to the Bishops ought not, perhaps, to be looked upon too seriously; but it was, like the projects of 1834, 1836, and 1837, an unsuccessful attempt from below to alter the composition of the House of Lords. Leave was asked to bring in a bill 'to relieve' the Lords Spiritual, who might in future be consecrated, from attendance in Parliament. The effect of such an Act would, of course, have been to remove the whole of the Spiritual Lords from the House by degrees, though no Bishop already consecrated would have been affected by it. Leave, however, was refused by a majority of fifty-six².

'Lords of
Appeal in
Ordinary'
made Lords
of Par-
liament
during
tenure of
office, in
1876.

In 1876 another and more successful attempt was made in the Upper House to introduce Temporal Lords of Parliament without hereditary peerages. It was, however, on a very limited scale, and was intended, like those of 1856, solely for the purpose of adding to the judicial strength of the House. Power was given by Statute to the Crown to appoint two 'Lords of Appeal in Ordinary,' with further power to appoint a third Lord of Appeal in Ordinary upon the death or resignation of two paid Judges of the Judicial Committee of the Privy Council, and a fourth upon the death or resignation of the two remaining paid

¹ Bill as amended in Committee, H. L. 113. Ordered to be printed June 3, 1869.

² *Journals of the House of Commons*, June 21, 1870 (vol. cxxv. p. 169).

Judges. These Lords of Appeal in Ordinary were to hold office during good behaviour, but might be removed on the address of both Houses of Parliament. They were entitled to rank as Barons during their lives. They were entitled also to a writ of summons to attend, and to sit and vote in the House of Lords so long as they continued in office, but no longer, and their dignity as Lords of Parliament was not to descend to their heirs¹. By these provisions an old principle was recognized, and a new principle introduced. The principle that the holder of a barony for life only (as in the case of Lord Hay) enjoyed the rank of Baron, and not the right of sitting and voting in Parliament, was, as it were, reasserted. The introduction of Lords with a right to be summoned, and to sit, and vote, not even for life, but only during the tenure of office, was quite new as applied to laymen, or was, at any rate, without precedent since the days of the earlier Chancellors.

This small innovation, designed for one particular legal end, did not satisfy those who considered that a greater change in the constitution of the House had become necessary. On June 20, 1884, Lord Rosebery moved, 'that a Select Committee be appointed to consider the best means of promoting the efficiency of this House.' His Lordship argued that, as the House of Lords had existed about six centuries without reform, some alterations had become necessary in order to bring the institution into conformity with the changed institutions by which it was surrounded. He laid particular emphasis upon the development of the Colonial Empire and of the Newspaper Press, as well as upon the want of representation, in the House, of certain sections of the community. After a debate of some length, in which the subject of life-peerages was discussed, the motion was negatived by a majority of thirty-nine².

The Earl of Rosebery's Motion touching 'the efficiency' of the House, in 1884.

In the meantime those Barons for life who were Lords of Parliament only during tenure of the office of Lord of

Lords of Appeal in Ordinary

¹ Appellate Jurisdiction Act, 1876, secs. 6, 14.

² Hansard, *Parl. Deb.*, 3rd series, vol. cclxxxix. 937-974.

CHAP. XV. Appeal, had continued to exist, but were shortly to assume a different position. In 1887 an Act was passed which enabled a retired Lord of Appeal to sit and vote as a member of the House of Lords during his life¹. The Lords of Appeal in Ordinary in this way became Lords of Parliament for life, but for life only, and without any dignity descendible to their heirs.

The Earl of Rosebery's Motion touching the constitution of the House in 1888.

Thus, twenty-one years after the memorable struggle over the Wensleydale peerage, the creation of Lords of Parliament for life was sanctioned by Statute. As, however, it had reference but to a few 'Law Lords,' a motion was again made by Lord Rosebery on March 19, 1888, 'that a Select Committee be appointed to enquire into the constitution of this House².' He referred to various political events which had occurred since his previous motion, and again urged the necessity of some reform of the House of Lords. Lord Wemyss moved, as an amendment, that 'it is not a safe thing to place the constitution of this House in the power of a Committee, nor consistent with its dignity to discuss before a committee the reason for its existence; and, if any changes in the constitution of this House are wanted, they should be debated and made by the House itself on the motion of the responsible Ministers of the Crown.' After a debate, in which the Marquess of Salisbury and Lord Kenry (the Earl of Dunraven) took part, the amendment was carried. As a substantive motion, however, it was set aside by means of the 'previous question.'

The Earl of Dunraven's scheme of 1888.

The year 1888 was fruitful of other schemes for the reconstruction of the House of Lords. A very remarkable bill was introduced by Lord Kenry (the Earl of Dunraven). The rights and privileges of existing Lords of Parliament, whether Spiritual or Temporal, were not to be affected. The election of Peers to serve in Parliament for Scotland and Ireland, and the rights of the Peers elected, were to remain as before. The Prince of Wales, Princes of the

¹ Appellate Jurisdiction Act, 1887, sec. 2.

² Hansard, *Parl. Deb.*, 3rd series, vol. cccxxiii. 1548-1606.

Blood Royal being Peers of the United Kingdom, the Lord Chancellor of Great Britain, the Archbishops of Canterbury and York, and the Bishops of London, Durham, and Winchester, the Lords of Appeal in Ordinary, whether holding office, or after resignation, and Peers holding or having held high judicial office, were in future to receive their writs of summons to Parliament as before; but, in other respects, the House was to be completely remodelled. There were to be one hundred and eighty Lords of Parliament elected by the Temporal Peers of the United Kingdom; and the effect of this provision would have been that the legislative functions of the hereditary peerage of the United Kingdom would have been delegated by degrees to a body selected from their own number. There were to be in addition Peers for life, not exceeding five in number, ten Peers either for life or for a limited term to represent the Colonies, two to represent the interests of Roman Catholic subjects, two to represent the interests of subjects who might be Protestant Dissenters, and two to represent the interests of 'science, letters, and sound learning generally.' Every County Council was to have the power of recommending one person to the sovereign to be appointed a Lord of Parliament. All Lords of Parliament elected by the Temporal Peers, or appointed on nomination by County Councils, were to hold office for nine years only, but to be capable of re-appointment or re-election. No Bishop elected or translated to any see but those of Canterbury, York, London, Durham, and Winchester was, on that ground, to become entitled to receive a writ of summons to Parliament. The number of Spiritual Lords would thus have been gradually reduced to five.

It was also provided that Peers might resign their seats and votes in the House of Lords, and that past Lords of Parliament and Peers not entitled to vote in the House of Lords should be capable of sitting in the House of Commons.

One of the proposed provisions was a modification of an amendment suggested by Lord Cairns to Earl Russell's Bill of 1869. This was that the First Lord of the Treasury,

CHAP. XV. any of Her Majesty's Principal Secretaries of State, the President of the Council, of the Board of Trade, and of the Local Government Board, the Lord Privy Seal, the First Lord of the Admiralty, the Postmaster-General, and the Chancellor of the Duchy of Lancaster might be heard in the House of Lords (though not otherwise entitled to a seat or voice), when any matter touching his office should be under debate. He was not, however, to be entitled to vote¹.

The Mar-
quess of
Salisbury's
scheme of
1888.

This very elaborate scheme, which was not accepted by the House of Lords, was very shortly followed by another, introduced by the Marquess of Salisbury on behalf of the Government of the day. His bill was of a far more simple character. The Crown was to have power to appoint persons with certain qualifications to be 'Peers of Parliament' for life. The total number of such Peers in existence at any one time was not to exceed fifty. No one was to be qualified for appointment unless he had been a Judge of a Superior Court in the United Kingdom for at least two years, had attained the rank of rear-admiral in the navy or major-general in the army, had been ambassador extraordinary and minister plenipotentiary, had become a privy councillor and been employed in the civil service of the Crown, or had been not less than five years Governor-General or Governor in any colony, or Lieutenant-Governor in India. No more than three persons so qualified were to be appointed in any one year. The Crown, however, was to have further power to appoint Peers for life on account of other special qualifications, but not more than two in any one year, nor any until the Sovereign had stated by message to the House of Lords the intention to appoint and the special qualifications for which the appointment was to be made². This Bill passed a second reading in the Upper House, but was then immediately withdrawn³.

¹ House of Lords (Constitution) Bill, 1888 (no. 51). Ordered to be printed March 23, 1888.

² House of Lords (Life Peers) Bill, 1888 (no. 161). Ordered to be printed June 18, 1888.

³ Hansard's *Debates*, 3rd series, vol. cccxxviii. 471.

Thus, although various propositions have been made by Peers of widely divergent political views, there have been no changes in the principles which govern the composition of the House of Lords, since the Lords of Appeal in Ordinary were made Lords of Parliament for life in 1887. From that time the House has consisted of the following classes of members :—(1) the Lords Temporal holding hereditary peerages in virtue of the creation of a peerage of England before the Union with Scotland, or of a peerage of Great Britain after that Union and before the Union with Ireland, or of a peerage of the United Kingdom at a later date ; (2) the sixteen representative Peers of Scotland elected and sitting only during the term of each particular Parliament ; (3) the twenty-eight representative Peers of Ireland, elected and sitting for their respective lives ; (4) those who are or have been ‘ Lords of Appeal in Ordinary,’ and are Lords of Parliament for life ; (5) the Lords Spiritual, or Archbishops and Bishops of English sees, having seats in virtue of their respective provinces or dioceses, or in virtue of their seniority over other Bishops who are not entitled to be summoned.

CHAP. XV.
The classes
of which
the House
of Lords
now con-
sists.

When these pages were written the total number of Lords on the roll was 567¹, there being one vacancy in the representation of the Peers of Ireland. Of these, sixteen were representative Peers of Scotland, twenty-seven representative Peers of Ireland, four Lords of Appeal in Ordinary, one retired Lord of Appeal in Ordinary, and twenty-six Lords Spiritual, of whom two were the Archbishops of Canterbury and York, and the remaining twenty-four were Bishops. The rest, 493 in number, were holders of hereditary peerages, of whom a few only were minors and

The num-
bers in each
class.

¹ Roll of the Lords Spiritual and Temporal in the second session of the twenty-fifth Parliament of the United Kingdom of Great Britain and Ireland. Ordered to be printed Feb. 3, 1893. Since the above was written the roll for the third session of the same Parliament (ordered to be printed March 15, 1894) has appeared. It differs slightly from its predecessor, but not in a manner to raise any new question of principle.

CHAP. XV. disqualified for sitting ; and they thus outnumbered all the other classes in the proportion of nearly seven to one.

Conclu-
sion :
changes in
the mean-
ing of con-
stitutional
terms, and
in particu-
lar of Par-
liament.

It would be difficult to find a better illustration than is afforded by the House of Lords of the transformations effected by time, on the one hand, and of the persistence, on the other hand, with which old names are used to designate changed institutions. Trial by Jury, Parliament, the House of Lords, and the House of Commons have all lost the character which they had when the respective terms were first used to describe them. Our English constitution was never in a condition of absolute stability, was hardly ever in any one century precisely what it had been in the century before. The jury, of which in early times the chief qualification was that it should be acquainted with the facts before it came into Court, that it should consist of neighbours who knew the affairs of the neighbourhood, is now supposed to try an issue, without bias or prejudice, by evidence admitted only according to strict legal rules. The Parliament which was at first only a meeting called by the Sovereign to discuss affairs of State, and varying in its constituent parts according to the subjects of discussion, is now in theory composed of the Sovereign, the Lords Spiritual, the Lords Temporal, and the representatives of the Commons. At one time the word Parliament was often used in the sense of the Lords Spiritual and Temporal, or House of Lords with the Council. At the end of the nineteenth century it is often used in current literature, in the sense of the House of Commons alone. The House of Commons itself but little resembles that assembly of knights, citizens, and burgesses, which once represented persons of substance, and consented on their behalf to give the King a portion of their goods. The House of Lords, however, is, perhaps, changed most of all.

Changes in
the consti-
tutional
position of
the Peers.

For some centuries the Lords were the pillars of the State in many senses of the term. They not only put the greater part of the King's armies into the field, but also contributed largely to the revenue of the kingdom, both in

peace and in war. If laymen, they were the King's generals, assisting him with their advice, and offering their lives and the lives of their followers in his cause. When foreign war was projected, their counsel was necessary in relation both to the plan of campaign and to the means of carrying it on. When civil war broke out, the King's reliance was on those tenants in chief who elected to remain faithful to him ; and no rebellion could be successful unless the rebellious tenants proved to be the stronger party.

The members of the House of Lords, whether spiritual or temporal, have now no longer any special burdens. They are under no obligation to support an army, except as tax-payers like any other subjects. They are not, as Peers, necessarily able to put forces into the field in times of emergency. As counsellors their occupation is gone, in practice if not in theory, except when they may happen, with commoners, to be members of the Privy Council or of the Cabinet. They are not even consulted as a body when the Sovereign is about to travel out of the realm ; and many of their privileges are lost, simply as being no longer possible in an altered state of society and law.

Yet, if two great events be left out of consideration—the loss of the seats of the Abbots when the greater monasteries were dissolved, and the abolition of military tenure as a consequence of the Great Rebellion—the House of Lords has become what it is by a gradual and natural process of development.

Yet the House of Lords is the result of a natural process of development.

It has lived the life of the nation, and grown with the nation's growth. It has, in the main, reflected the nation's thoughts and manners, as additions have been made to its numbers. If the descendants of some of the mistresses of Charles II represent the profligacy of the Restoration, and if the descendants of some Peers created since that time represent political intrigues rather than the strictest political integrity, it is because public opinion has not always been cast in a puritanical mould, and because the nation has not always been discriminating in its worship of heroes. The

Its ranks have been recruited from representative men.

CHAP. XV. higher and nobler life of the nation, or that which the nation has believed to be its higher and nobler life, has also left a mark, and a clearer mark, upon the Upper House of Parliament. The leaders of its armies and of its fleets, who made its name respected in the world, and shed their blood to build up its empire, have sat there and handed down their seats to their posterity. The men whose commercial genius contributed to render the nation the richest in the world have been honoured in the same manner as its great military and naval commanders—and in recent times without distinction of party or creed. The sages of the law, more irreproachable, as a body, than those of any other land, have had their learning and their wisdom recognized in the persons of those who were believed to be most worthy.

The national habits have commonly been reflected in new creations of Peers.

In one respect the House of Lords fails, and has always failed, to reflect the powers of the nation. The new men who have made their way into it have always been rather the men of action than the men of thought. The inventors and thinkers, who should, perhaps, be Britain's greatest pride, and who have changed the face of the whole earth, and the tone of all civilized thought, have never been placed on the Roll of the Lords. No Newton, no Hunter, no Arkwright, no Watts, no Stephenson is there. Very few years have elapsed since a historian was, for the first time, created a Peer; and he was a partisan. Still fewer years have elapsed since a poet, as poet, was so honoured for the first time. No painter, or sculptor, ever gained a coronet. Yet even here the national habits are faithfully reflected. The inventor and the thinker are rarely appreciated by their contemporaries; and the man of letters wins only in a later generation those spurs which are never to be hacked off. The robes of the judge, the wealth of the financier, the pomp and circumstance which attend the victorious general strike more deeply into the popular imagination than the untiring industry, the silent meditation, and the unseen flash of intellect, which bring into being things that the world has never seen before.

Thus, even in its defects, the House of Lords has, since it ceased to be a house of feudal Peers, been a not unfaithful mirror of the country—not, indeed, of all the country's fleeting moods, but of the country's matured decisions and accomplished deeds. It has always had, and, from the nature of its composition, must have a deep-seated reverence for the ages that have passed away, and a sympathy no less deep with the men who constituted it in earlier generations. Its roll is a register in brief of some things that Englishmen would fain forget, of many things that every British subject may be proud to remember. It links the history that has been made with the history that is still in the making ; and when matters of great moment are laid before it, the vote which it records may be regarded not only as the opinion of a particular body of living men, but also as the sentence which is given upon the Present by the Past.

CHAP. XV.

The House
is a link
between
the Present
and the
Past.

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